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# FEDERAL COMMUNICATIONS COMMISSION REPORTS
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Reported by the Commission

## FEDERAL COMMUNICATIONS COMMISSION

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CHARLOTTE T. REID
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FCC 74-408

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
ARROYO BROADCASTERS, INC.
For Construction Permit for New Standard Broadcast Station in Arroyo-Patillas, P.R.

APRIL 16, 1974.

ARROYO BROADCASTERS, INC.,
*Suite 1202,*
*Darlington Building,*
*Rio Piedras, P.R. 00928.*

GENTLEMEN: This is in reference to your application tendered for filing on October 8, 1973, as amended, for a construction permit for a new standard broadcast station to operate unlimited time on 780 kilohertz in Arroyo-Patillas, Puerto Rico.

The engineering exhibit accompanying the application indicates that the proposed nighttime 0.025 mV/m—10 percent contour would overlap the border of the contiguous 48 states in contravention of section 73.25(a)(4) of our rules. Studies by the Commission's staff confirm that there is such overlap. Since you recognize that your proposal is in violation of this section, you have requested a waiver. In support of the request, it is stated that the proposed 0.025 mV/m—10 percent contour does not overlap the mainland, but only offshore islands; that the area which would receive the proposed overlap is already overlapped by the 0.025 mV/m—10 percent contour of stations CMHD, Santa Clara, Cuba, and ZVBI, Roadtown, Tortola, British Virgin Islands; and that no interference would be caused to the class I–A station on the channel, WBBM, Chicago, Illinois.

The purpose of section 73.25(a)(4) is to prevent the allocation of stations which may restrict our latitude in determining the future uses to be made of the class I–A channels. Therefore, the lack of interference to WBBM is irrelevant to the purpose of section 73.25(a)(4) and cannot justify a waiver. Also, we cannot place any weight on the present overlap of the border by the 0.025 mV/m—10 percent contours of other stations. (We also note parenthetically that, in any event, we cannot consider ZVBI because it is located outside of the North American Region, as defined in part I, section 2, of the North American Regional Broadcasting Agreement.)

We have, however, concluded that a waiver of section 73.25(a)(4) is warranted. Our reasoning is related to the minimal amount of overlap, and therefore the minimal amount of preclusion of possible future use of the channel. The overlap is on the order of two or three miles



104-037——1

and is confined to islands off the Florida coast. We note also that you are proposing the minimum permissible efficiency of 87.5 mV/m and the minimum permissible power of 250 watts.

Accordingly, we have this date waived section 73.25(a)(4) of our rules to the extent necessary to permit acceptance of your application. The application will be processed in due course.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-152

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Applications of<br>BRINDLEE BROADCASTING CORP., ARAB, ALA. | Docket No. 19849<br>File No. BPH-7961 |
| MARSHALL COUNTY BROADCASTING CO., INC., ARAB, ALA.<br>For Construction Permits | Docket No. 19851<br>File No. BPH-8224 |

MEMORANDUM OPINION AND ORDER

(Adopted April 24, 1974; Released May 1, 1974)

BY THE REVIEW BOARD:

1. This proceeding involves the above-referenced applications for construction permits for new FM broadcast stations at Arab, Alabama. By Order, 38 FR 30577, published November 6, 1973, the Commission designated the applications for hearing under a standard comparative issue. Presently before the Review Board is a petition, filed November 21, 1973, by Marshall County Broadcasting Company, Inc. (Marshall) seeking to add the following issues against Brindlee Broadcasting Corporation (Brindlee):[1]

(*a*) Whether the public interest would be served by permitting cross-ownership between the Brindlee Mountain Telephone Company and an FM broadcast facility in Arab, Alabama, which would be located within said telephone company's exchange area.

(*b*) To determine the extent to which the principals of the Brindlee Broadcasting Corporation have ownership interests in media related and other financial enterprises which would result in pervasive economic influence and control in the city of Arab inconsistent with the public interest.

(*c*) To determine whether Brindlee Broadcasting Corporation has failed to disclose material facts concerning the business interests and official relationships of its principals.

*Cross-Ownership Issue*

2. In support of the first issue, Marshall contends that Sid McDonald, vice-president and 80% shareholder in Brindlee, is also president, general manager and 50% stockholder in the Brindlee Mountain Telephone Company, which provides telephone exchange service to the

[1] Also before the Board are the following related pleadings: (*a*) Opposition, filed December 2, 1973, by Brindlee; (*b*) motion for the acceptance of an attachment to opposition, filed December 13, 1973, by Brindlee; (*c*) comments, filed December 12, 1973, by the Broadcast Bureau; and (*d*) reply, filed December 21, 1973, by Marshall. The Board will grant Brindlee's motion and accept for consideration a copy of an amendment to its application which was inadvertently omitted from its opposition.

city of Arab and the surrounding area. Relying principally on the Commission's action in *The Court House Broadcasting Co.*, 37 FCC 2d 524 (1972), involving the proposed assignment of a broadcast license to a wholly-owned subsidiary of a telephone company, petitioner submits that a telephone company affiliation with a broadcast station creates a potentially anticompetitive situation. According to Marshall, broadcasters rely on local telephone facilities for programming transmission and studio to transmitter connections, and thus an affiliated telephone company could offer preferential treatment to its commonly-owned station to the competitive disadvantage of other local broadcasters. Like considerations, Marshall contends, underlay the Commission's treatment of affiliated telephone and cable companies in *Telephone Companies Affiliated With CATV Systems*, 21 FCC 2d 307, 18 RR 2d 1549 (1970). Marshall concludes that it is solely the potential for anti-competitive abuse which underlies its requested issue, not any actual impropriety on the part of Brindlee or any of its principals. The Broadcast Bureau supports addition of the issue and believes that since the issue is one involving policy, it should be certified to the Commission for resolution in the event that Brindlee is the otherwise successful applicant.

3. In opposition, Brindlee argues that the Commission's Order in *The Court House Broadcasting Co.*, *supra*, was motivated by the fact that the Ohio Bell Telephone Company, a wholly owned subsidiary of AT&T, was the largest single shareholder in the proposed assignee and that the Commission's staff was concerned with the consent decree barring AT&T from broadcast ownership.[2] Here, however, petitioner notes, AT&T has no interest in the Brindlee Mountain Telephone Company of which Brindlee stockholder McDonald is president. Furthermore, Brindlee contends that the type of cross-ownership situation complained of by Marshall is a subject inherently more amenable to decision in a rule-making proceeding than in an adjudicatory context.

4. In reply, Marshall asserts that an examination of the Commission's Order in the *Court House* case, *supra*, fails to reveal any concern with the distribution of stock in the assignee corporation and that in fact the Commission centered its inquiry only upon whether the public interest would be served by permitting a telephone common carrier to become a broadcast licensee. Moreover, according to petitioner, there is clear Commission precedent supporting the specification, analysis and determination of basic public interest issues in an adjudicatory context whether or not there has ben a rulemaking proceeding, citing *General Electric Cablevision Corp.*, 10 FCC 2d 198, 11 RR 2d 310 (1967); *Eastern Broadcasting Corp.*, 30 FCC 2d 745, 22 RR 2d 472 (1971); and *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 8 RR 2d 991 (1966).

5. The Review Board will deny Marshall's request for a cross-ownership issue.[3] In *The Court House Broadcasting Co.*, *supra*, the only case directly in point, the Commission scheduled an oral argument to examine the policy question presented by the proposed assignment, *i.e.*, whether the public interest would be served by allowing a common

[2] See *U.S.* v. *Western Electric Company, Inc.*, 13 RR 2143 (U.S.D.C. D.N.J. 1956).
[3] In the Board's opinion, there is no need to certify the question to the Commission, as the Bureau suggests in its comments.

carrier to acquire and operate a broadcast station within its telephone exchange area. The question was never resolved, however, because of the subsequent withdrawal of the subject application. Although we agree with petitioner that there is clear Commission precedent for specifying an issue in the absence of a specific statement of policy where serious public interest questions are raised, nevertheless, we are constrained to point out that such issues must be supported by specific factual allegations. *Cf.* Section 1.229 of the Commission's Rules. However, in the instant case, the Board is of the view that petitioner has failed to make such allegations sufficient to show that the applicant's principal's interest in the telephone company and broadcast station would be contrary to the public interest. No specific abuses as a result of the telephone company-broadcast applicant cross-ownership have been alleged nor has it been shown whether Brindlee's principal's 50% ownership in the telephone company would enable him to engage in such activities, Indeed, the insufficiency of petitioner's claim is underscored by its concession that there is absent any actual impropriety on the part of Brindlee or any of its principals.[4] In any case, however, the differences between the applicants' ownership interests may be explored under the diversification criterion of the standard comparative issue. *Cf. Stamps Radio Broadcasting Co.*, 11 FCC 2d 48, 11 RR 2d 1008 (1967).

*Cross-Interest Issue*

6. Petitioner next urges that specification of requested issue (b) is appropriate in view of the extensive media and other business interests held by the Brindlee principals.[5] In support, petitioner notes that in addition to his interest in the Brindlee Mountain Telephone Company, Mr. McDonald is also a 100% owner of Arab Cablevision Company, Inc., a CATV system which serves the city of Arab; an organizing director of the Security Bank and Trust Company, one of the two commercial banks in Arab; and the controlling shareholder of the PLV Corporation, a real estate company in the process of constructing Arab's largest single housing development. In addition, petitioner asserts, the Federal Home Loan Bank Board on January 23, 1973, tentatively approved Mr. McDonald's application to organize a federal savings and loan association in Arab. Moreover, according to Marshall, the savings and loan application indicates that Mr. McDonald is a minority stockholder in the Arab Insurance Agency, Inc. and the Arab Real Estate Company, Inc. Also, Bill Kennedy, the president and 19.98% shareholder of Brindlee and Willene Clark, its corporate secretary and .02% shareholder, are both employed by the telephone company, petitioner asserts. Finally, Marshall alleges that Mr. Kennedy and Ms. Clark were as of December 31, 1972, vice-president and secretary, respectively, of the Arab Cablevision Company, Inc. Marshall concludes that these interests held by Brindlee principals, in a city of under 5,000 population, warrant addition of the requested issue.

[4] We note in this respect that Marshall is licensee of Station WRAB, the only other broadcast facility in Arab, but has not alleged any discriminatory treatment in the past by the telephone company.

[5] The petitioner characterizes the requested issue as lying somewhere between what the Commission terms an "economic dominance" issue and what it terms a "cross-interest" issue.

7. In opposition, Brindlee asserts that there is no legal basis for the addition of either an economic dominance issue or a cross-interest issue. In support thereof, Brindlee claims that an economic dominance issue has been added in the past only in cases where there has been virtual ownership or control of an entire city by an applicant or its principals and the traditional cross-interest issue applies only where an applicant's principal is associated with a broadcast station, an advertising agency, or a station representative firm. In an affidavit attached to the opposition, Mr. McDonald avers that, with the exception of his interests in the local telephone and CATV businesses which are regulated by the federal and/or state agencies, he does not have a dominant influence over any aspect of the business community of Arab. That is, his ownership interest in the Security Bank and Trust Company is only 3%; the savings and loan association will be owned by its depositors and borrowers; and the real estate and insurance firms in which he has minor interests are in competition with five other Arab real estate firms and ten other local insurance firms. The Broadcast Bureau agrees with Brindlee that an insufficient showing has been made to justify addition of the requested issue.

8. In the Board's view, neither a cross-interest nor an economic dominance issue is warranted. First, with respect to cross-interest, petitioner fails entirely to allege any of the necessary elements underlying or comprising the Commission's policy barring individuals from maintaining significant interests in competing facilities in the same broadcast service serving substantially the same area. See *Eastern Broadcasting Corp., supra.* Additionally, an insufficient showing has been made to justify the addition of an economic dominance issue. Past cases in which such an issue has been added involved far more substantial economic domination of a community by an applicant or its principals than is alleged here. Thus, in *Midland Broadcasting Company*, 12 FCC 611, 3 RR 1961 (1948), "company town" domination was found; the applicant employed 90% of the population of the community. In *Hershey Broadcasting Co., Inc.*, 22 RR 1070 (1962), the Hershey estate virtually owned and operated the community, providing recreation facilities, utilities and employment for much of the populace. In our view, the business interests of McDonald and the other Brindlee principals do not approach the dominance present in these cases. See *Industrial Business Corp.*, 40 FCC 2d 69, 26 RR 2d 1447 (1973). Moreover, just as we can find no justification for addition of either a cross-interest or economic dominance issue, we can perceive no basis for a hybrid issue combining elements of both doctrines as requested by petitioner. However, these allegations may be explored under the existing standard comparative issue.

*Nondisclosure Issue*

9. In support of its requested nondisclosure issue, petitioner claims that Table II, of Section II of Form 301 ("Business and Financial Interest") requires that the following interests should have been reported

by Brindlee:[6] (1) Mr. Kennedy's and Ms. Clark's official relationship in the Arab Cablevision Company; (2) Mr. McDonald's position vis a vis the proposed savings and loan association: (3) Mr. McDonald's interest in both the Arab Insurance Agency, Inc. and the Arab Real Estate Co., Inc.; and (4) his position as a director of the Brindlee Businessmen Investment Group, Inc. The Broadcast Bureau supports addition of the requested issue and states that a Rule 1.65 issue may be required as well because of Mr. McDonald's failure to amend his application when tentative approval for the savings and loan association was obtained on January 23, 1973.

10. In opposition, Brindlee asserts that the omission were unintentional and not of decisional significance. In his affidavit attached to the opposition, Mr. McDonald states that at the time the original application was prepared, he mistakenly believed that the Commission desired a listing of only those businesses in which an applicant's principals had been engaged as active participants or owned a major interest (25% or greater). Brindlee claims that with the exception of a franchise for a Tuskeegee CATV system, obtained by the Tuskeegee Cablevision Company, Inc., in which Mr. Kennedy and Mr. McDonald are the sole stockholders, and they and Ms. Clark the officers,[7] none of the omissions involved more than an occasional activity of any of the principals or an ownership interest in excess of 10%.[8] Thus, Brindlee states, Mr. Kennedy's and Ms. Clark's directorships in the Arab Cablevision Company were not reported since Mr. McDonald has full ownership and control of the company; and Mr. McDonald's organizing interest in the savings and loan association was not reported because he will have no ownership interest in the institution. Mr. McDonald also indicates in his affidavit that he is director and 9% owner of the Arab Real Estate Co., Inc., Brindlee Businessmen Investment Group, Inc., and Arab Insurance Agency, Inc., but has not taken an active part in these businesses.

11. The Board is of the view that Brindlee's omissions with regard to the various business interests of its principals warrant the addition of a Rule 1.514/1.65 issue. Although Brindlee represented that its principals, operating as the Tuskeegee Cablevision Company, had only secured a franchise for the Tuskeegee CATV system and that the franchise was subsequently assigned to another party, it appears that Tuskeegee Cablevision Company's application for a certificate of compliance was granted by the Commission on July 24, 1973. This apparent contradiction is unexplained and it belies Brindlee's claim that this interest was voluntarily disclosed. In our view, Brindlee's failure to report the grant of the certificate of compliance for a CATV system which its principals owned and operated raises serious ques-

[6] Table II, Section II of Form 301 requires the disclosure of ". . . any other business or financial enterprise in which the party has now or within the past five years has had either a 25% or greater interest or any official relationship.

[7] According to Brindlee, since this CATV franchise is being voluntarily reported with this pleading, no motive for concealment is present and therefore no issue should be added.

[8] Mr. McDonald states in his affidavit, with regard to the Tuskeegee CATV system, that "other than securing the franchise, no steps were ever taken to build the system," and that the franchise was subsequently assigned to another party. However, in its reply, Marshall County attaches a copy of a certificate of compliance for the Tuskeegee CATV system, granted by the Commission on July 24, 1973, and issued to the Tuskeegee Cablevision Company, Inc.

tions concerning its compliance with Rule 1.65. In addition, the information concerning the applicant's principals' other business interests should have been reported initially or the application amended as significant changes occurred. The omissions here were numerous; and although none, standing alone, would raise a serious question, we believe that taken together, and with the above Tuskeegee CATV omission, they require addition of an appropriate issue.

12. Accordingly, IT IS ORDERED, That the motion for acceptance of an attachment to opposition, filed December 13, 1973, by Brindlee Broadcasting Corporation, IS GRANTED; and

13. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed November 21, 1973, by Marshall County Broadcasting Company, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

14. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issue:

**To determine whether Brindlee Broadcasting Corporation has complied with the provisions of Sections 1.514 and 1.65 of the Commission's Rules with respect to the business interests and official relationships of its principals, and, if not, to determine the effect of such non-compliance on the basic or comparative qualifications of the applicant.**

15. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the added issue SHALL BE on Marshall County Broadcasting Company, Inc. and the burden of proof SHALL BE on Brindlee Broadcasting Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-426

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Applications of<br>CABLECOM-GENERAL, INC., MENLO PARK, CALIF. | CAC-1686<br>CA547 |
| CABLECOM-GENERAL, INC., UNINCORPORATED AREAS OF SAN MATEO COUNTY CONTIGUOUS TO MENLO PARK, CALIF.<br>For Certificates of Compliance | CAC-1687<br>CA402 |

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released May 1, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. Cablecom-General, Inc., has filed applications for certificates of compliance to operate new cable television systems at Menlo Park, California, and certain unincorporated areas of San Mateo County, contiguous to Menlo Park (CAC-1686, CAC-1687), located within the San Francisco-Oakland-San Jose, California, major television market (#7).[1] Cablecom proposes to carry the following television broadcast signals:

KGO-TV (ABC, Channel 7), San Francisco, Calif.
KRON-TV (NBC, Channel 4), San Francisco, Calif.
KPIX (CBS, Channel 5), San Francisco, Calif.
KTVU (Independent, Channel 2), Oakland, Calif.
KEMO-TV (Independent, Channel 20), San Francisco, Calif.
KUDO (Independent, Channel 38), San Francisco, Calif.
KBHK-TV (Independent, Channel 44), San Francisco, Calif.
KQED (Educational, Channel 9), San Francisco, Calif.
KQEC (Educational, Channel 32), San Francisco, Calif.
KNTV (ABC, Channel 11), San Jose, Calif.
KGSC-TV (Independent, Channel 36), San Jose, Calif.
KTEH (Educational, Channel 54), San Jose, Calif.
KCSM-TV (Educational, Channel 14), San Mateo, Calif.
KCRA-TV (NBC, Channel 3), Sacramento, Calif.
KXTV (CBS, Channel 10), Sacramento, Calif.
KOVR (ABC, Channel 13), Stockton, Calif.
KSBW-TV (NBC, Channel 8), Salinas, Calif.
KMST (CBS, Channel 46), Monterey, Calif.

Prior to March 31, 1972, Cablecom, pursuant to former Section 74.1105 of the Commission's Rules, filed notices of proposed service for

[1] Menlo Park has a population of 26,734, and the surrounding areas of San Mateo County, 14,852. The proposed cable systems will have 40-channel capacity. Of these channels, eighteen are to be used for television broadcast signal carriage and four for access cablecasting.

both Menlo Park and the unincorporated areas of San Mateo County.[2] Since these notices complied with our former rules, were unopposed, and were properly served, Cablecom was authorized to carry all the above-requested signals. Consequently, carriage of the above-listed signals is "grandfathered" pursuant to Section 76.65 of the Commission's Rules.

2. Cablecom's applications are opposed by Gill Industries, licensee of Station KNTV, San Jose, California. In its opposition Station KNTV argues: (a) Cablecom failed to show that it is lawfully franchised by Menlo Park or that the Menlo Park and San Mateo County franchises, awarded originally to Peninsula TV Power, Inc., were lawfully assigned to Cablecom. If the franchises were lawfully assigned, it adds, no verification was submitted so that the Commission could determine whether the old franchises remained in effect or whether new franchises were issued;[2a] (b) the San Mateo County franchise does not contain a showing that Cablecom's qualifications were approved at a public proceeding affording due process; (c) Cablecom did not apply for separate certification for the discrete communities within San Mateo County; and (d) Cablecom failed to state that it would provide a full complement of access channels for each of its two systems, as required by Section 76.251 of the Commission's Rules.

3. In its reply to (d) above, Cablecom asks that its pleading be considered as a petition for special relief and waiver of our access channel requirements if our Rules require separate access channels for each system operating from a single headend. The cable operation involves Menlo Park and immediately outlying areas of San Mateo County. The distance from one end of the system to the other is only five miles. Both Menlo Park and San Mateo County were aware at the time they authorized the assignment of franchises that Cablecom was planning one set of access channels to be used on a shared basis. In fact, Section 7 of Resolution No. 30814, in which the Board of Supervisors of San Mateo County approved the assignment, is conditioned on Cablecom's agreement not to discriminate against county participation in access programming, and on equitable administration of the cable operation between the Menlo Park franchise area and the county franchise area. Cablecom argues that since its systems are on the fringe of the San Francisco market, in which many television signals are available, cable penetration is apt to be low, growth will be slow, and start-up costs high; therefore, requiring duplication of access facilities would constitute an undue burden. Cablecom recognizes its obligation to expand facilities as demand for more access channels grows.

4. We reject Station KNTV's objections for the following reasons: (a) Cablecom has submitted sufficient documents to show that both systems are lawfully franchised by the appropriate franchising author-

[2] The notices for Menlo Park were filed on July 14, 1969 and February 18, 1972; the notices for San Mateo County were filed on October 22, 1969 and February 18, 1972.

[2a] If the original franchises, awarded September 2, 1969, and October 2, 1969, are still in effect, they need comply only substantially with Section 76.31 of the Commission's Rules. The resolutions approving the assignments of the franchises were adopted after March 31, 1972. Therefore, if these resolutions constitute new franchises, they would have to be in strict compliance with Section 76.31 of the Rules.

ity and that the franchises were lawfully assigned to it.[3] The resolutions consenting to the transfers did not constitute new franchises, but were merely amendments to franchises granted prior to March 31, 1972. Therefore, substantial compliance with the requirements of Section 76.31 of the Rules is all that is required;[4] (b) the Resolution No. 30814 of the Board of Supervisors, County of San Mateo, states that the Board held advertised public hearings on the question of assignment, including testimony on Cablecom's qualifications; (c) while our Rules require separate franchises for single, discrete, unincorporated areas, it is for the franchising authority initially to determine the units of the unincorporated territory. In this instance, the San Mateo County Board of Supervisors has determined the "Menlo Park Census track" is one area. It has granted a franchise for the whole territory except for the cities of Menlo Park and Atherton, California, over which it has no authority.[5] Although the various subdivisions are known locally by individual names, we will accept the county's determination that these areas are but one; (d) in view of the close geographical proximity of the two systems in one contiguous urban area,[6] and the pledge of Cablecom to provide additional access channels as demand arises (we note that it is planning to install sufficient channel capacity to allow it to satisfy access requirements for both systems), and the agreement negotiated with the County not to discriminate against it, we will waive our requirement of four access channels for each system until March 31, 1977.[7] However, should sufficient demand develop, we expect Cablecom to make additional access channels available.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications and partial waiver of Section 76.251 of the Rules would be consistent with the public interest.

---

[3] These documents include copies of (1) Ordinance No. 185 of the City of Menlo Park, dated October 28, 1969, granting a franchise to Peninsula TV Power, Inc., (2) Resolution No. 26792 of the Board of Supervisors, County of San Mateo, dated September 2, 1969, granting a franchise to Peninsula TV Power, Inc., (3) Resolution No. 2526 of the City Council of the City of Menlo Park, dated August 22, 1972, consenting to the transfer of the franchise by Peninsula TV Power, Inc., to Cablecom-General, Inc., and (4) Resolution No. 30814 of the Board of Supervisors, County of San Mateo, dated September 26, 1972, approving the assignment of the franchise by Peninsula TV Power, Inc., to Cablecom-General, Inc.

[4] The franchises are in full compliance with Section 76.31 of the Rules, except that they contain no provision specifying complaint procedure and requiring a local agent, consistent with Section 76.31(a)(5), and no provision, consistent with Section 76.31(a)(6), requiring modifications of Section 76.31 to be incorporated into the franchise within one year of the adoption of such modifications; and the Menlo Park franchise has no provision concerning a construction schedule, pursuant to Section 76.31 (a)(2). However, Cablecom-General states it will comply with the provisions of Section 76.31. In addition, the franchise fees of Menlo Park and San Mateo County are 5 percent and 4 percent, respectively. Measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10, *recons. denied*, FCC 73–292, 40 FCC 2d 493, the franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of the above-captioned applications until March 31, 1977.

[5] The County Board of Supervisors granted a franchise for the same area to Peninsula Cable Television Corp. of Menlo Park more than three months before it issued this franchise to Peninsula TV Power, Inc., of Sunnyvale.

[6] There are two "pockets" which are not contiguous, but they are very close to the rest of the areas to be served.

[7] We granted a similar waiver for a much larger new system serving four communities from a common headend in *Saginaw Cable TV Co.*, FCC 73–121, 39 FCC 2d 496. The four communities had populations of 91,849, 27,234, 2,072, and 8,526. Menlo Park and the surrounding areas have populations of 26,734, and 14,852. In *Theta Cable of California*, FCC 73–826, 42 FCC 2d 387, communities of 21,000, 8,000, 9,500, and 3,000 share one public access and one government access channel. See also: *Stark County Communications, Inc.*, FCC 72–1189, 38 FCC 2d 1147, and *Regional Cable Corp.*, FCC 73–123, 39 FCC 2d 494.

Accordingly, IT IS ORDERED, That the "Opposition to Applications for Certificates of Compliance," filed February 5, 1973, by Gill Industries, licensee of Station KNTV, is DENIED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–1686, CAC–1687) ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-164

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| In Re Applications of | |
|---|---|
| CAVALLARO BROADCASTING CORP., SAN JUAN, P.R. | Docket No. 19897<br>File No. BP-19073 |
| BORICUA BROADCASTING CORP., SAN JUAN, P.R. | Docket No. 19898<br>File No. BP-19201 |
| SUMMIT BROADCASTING OF PUERTO RICO, INC., SAN JUAN, P.R. | Docket No. 19899<br>File No. BP-19202 |
| JOSE A. FIGUEROA AND ANTONIO L. OCHOA, D.B.A. FIGUEROA AND ASSOCIATES, RIO GRANDE, P.R. | Docket No. 19900<br>File No. BP-19203 |
| VIEQUES RADIO CORP., ISABEL SEGUNDA, VIEQUES, P.R. | Docket No. 19901<br>File No. BP-19204 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

(Adopted May 3, 1974; Released May 8, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. By Commission Order, FCC 73-1310, 39 FR 1107, published January 4, 1974, the above-captioned mutually exclusive applications to construct a new standard broadcast station in San Juan, Puerto Rico, were designated for consolidated hearing on several issues, including a financial issue (Issue 4) against Boricua Broadcasting Corporation (Boricua).[1] The Commission concluded that the balance sheets of a majority of the stock subscribers did not reflect sufficient cash or liquid assets in excess of current liabilities to meet their commitments, and, therefore, the Commission sought to adduce evidence of the availability of additional funds. Now before the Review Board is a petition to delete Issue 4, filed January 21, 1974, by Boricua.[2]

2. Petitioner maintains that the Commission's designation of the financial issue failed to reflect consideration of an amended financial plan submitted September 5, 1972, by Boricua, in which the applicant substituted a bank loan commitment for its stock subscription plan as a means of financing its proposed station.[3] Petitioner points out that the designation Order only states: "Boricua plans to meet its costs with

[1] Issue 4 states, in part:
"To determine with respect to the application of the Boricua Broadcasting Corporation:
"(a) Whether sufficient funds are available to stock subscribers to meet their commitments to purchase stock."

[2] The following related pleadings are also before the Board: (a) Comment, filed January 28, 1974, by Cavallaro Broadcasting Corporation; (b) opposition, filed March 1, 1974, by the Broadcast Bureau; and (c) reply, filed April 5, 1974, by Boricua.

[3] The amendment in question was actually filed with the Commission on September 11, 1972. A further amendment containing, *inter alia*, information that Mr. Raphael Vizcarronda and Mr. Enrique Soler had elected to withdraw as stockholders and changing the amount of paid-in capital from $21,201 to $18,001, was filed on September 27, 1972.

cash on hand or in banks in the amount of $21,201; stock subscriptions receivable, $215,000; and loans from stock subscribers, $266,000." Boricua contends that its September amendment shows that the proceeds from its bank loan make its total available capital $438,698,[4] and that this amount is more than sufficient to meet its first-year construction and operating costs of $434,000.[5] Thus, Boricua argues, the issue relating to its financial qualifications should be deleted. In a comment, filed January 28, 1974, Cavallaro Broadcasting Corporation urges that Boricua's petition be granted.

3. In opposition, the Broadcast Bureau contends that in only one respect are Boricua's allegations correct: the financial issue as presently framed fails to take into consideration the financial amendment submitted by Boricua in September, 1972. Accordingly, the Bureau recommends modification, rather than deletion, of the financial issue. With respect to the alleged deficiencies in Boricua's petition, the Bureau notes, first, that the bank commitment letter fails to specify what, if any, collateral or security will be required, citing paragraph 4(e), Section III, FCC Form 301. Second, the Bureau points out that Boricua erroneously relied on paid-in capital totalling $21,201, since Boricua had previously amended the amount of paid-in capital to $18,001 on September 27, 1972. See footnote 3, *supra*. Finally, asserts the Bureau, Boricua may not claim credit for $67,497 in deferred credit since the Commission included only a portion of the $152,500 in equipment costs (*i.e.*, the amounts allocated for down payment, principal and interest) as part of the $434,000 estimated first-year costs of construction and operation. The Bureau concludes that Boricua will have only a questionable $350,000 bank loan and $18,001 in paid-in capital to meet $434,000 in construction and first-year operating costs. Since Boricua would, therefore, require $66,000 in additional funds, the Bureau proposes modification of Issue 4 to permit an inquiry into Boricua's financial qualifications.

4. Boricua, in reply, reiterates its position that the financial issue should be deleted. Initially, Boricua argues that the Bureau should not be permitted to request modification of the designated issue without filing a formal petition to modify. In response to the substance of the Bureau's opposition, petitioner avers that none of the three grounds set forth by the Bureau sufficiently supports the Bureau's position. Boricua submits that the bank letter sets forth sufficient information to enable the Commission to determine the propriety of the available loan. Although Boricua concedes that the amount of paid-in-capital should have read $18,001 rather than $21,201, it suggests that the difference of approximately $3,000 does not significantly affect its financial qualifications. Boricua also contends that the $67,497 in deferred credit should be considered in determining its financial resources to meet first-year construction and operating costs.

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[4] In Boricua's amendment, filed September 27, 1972, total available capital was reduced to $435,498, consisting of paid-in capital of $18,001, deferred credit in the amount of $67,497, and the $350,000 bank loan.

[5] Boricua takes no exception to the estimates (set forth in the designation Order) of the applicant's construction costs and initial operating expenses of $434,000. This total includes: down payment on equipment, $38,125; first-year payments on equipment with interest, $43,375; land, $84,000; building, $6,000; miscellaneous, $112,500; and working capital (first year), $150,000.

5. The petition to delete Issue 4 will be denied; however, on the Review Board's own motion,[6] the existing financial issue will be modified to permit inquiry into the availability to Boricua of the $350,000 bank loan from Banco Credito Y Ahorro Ponceno and the availability of additional funds to meet the proposed construction and first-year operating expenses. The Board has held on numerous occasions that it will not delete issues designated by the Commission "absent a compelling showing of unusual circumstances." *Charles W. Holt*, 37 FCC 2d 64, 65–66, 24 RR 2d 1002, 1005 (1972); *Jacksonville Broadcasting Company*, 31 FCC 2d 751, 754, 22 RR 2d 1046, 1050 (1971). Clearly, petitioner has failed to show that the facts presented here warrant deletion of the financial issue. Despite the fact that the Commission appears to have overlooked Boricua's September, 1972 financial amendments, petitioner has not established that this omission obviates the necessity for inquiry into its financial qualifications. Even assuming the availability of the $350,000 bank loan and $18,001 in paid-in capital, the applicant's financial resources, totalling $368,001, fall far short of the amount needed to meet its estimated $434,000 first-year costs of construction and operation.[7] In addition, since the bank loan is now essential to Boricua's financial qualifications and there is no indication as to what, if any, collateral or security the Banco Credito Y Ahorro Ponceno will require before advancing the $350,000 to Boricua, an inquiry is appropriate to clarify the applicant's financial status. See *Viking Television, Inc.*, 16 FCC 2d 1018, 1021, 15 RR 2d 954, 958 (1969); *Christian Voice of Central Ohio*, 15 FCC 2d 303, 14 RR 2d 785 (1968). *Cf. Western Communications, Inc. (KORK–TV)*, 39 FCC 2d 1077, 26 RR 2d 1456 (1973), request for clarification dismissed FCC 73R–157, released April 13, 1973, review denied FCC 74–175, released February 21, 1974; *WWKY, Inc.*, 44 FCC 2d 239, 28 RR 2d 1551 (1973).

6. Accordingly, IT IS ORDERED, That the petition to delete issue, filed January 21, 1974, by Boricua Broadcasting Corporation, IS DENIED; and

7. IT IS FURTHER ORDERED, That, on the Board's own motion, Issue 4 IS MODIFIED to read:

(4) To determine with respect to the application of the Boricua Broadcasting Corporation:

(*a*) The terms and conditions of the proposed bank loan from Banco Credito Y Ahorro Ponceno, whether Boricua Broadcasting Corporation can meet those terms and conditions, and whether, in light thereof, the proposed loan will in fact be available to it;

(*b*) Whether the applicant will have sufficient additional funds to construct and operate its proposed station; and

(*c*) In the light of the evidence adduced pursuant to (*a*) and (*b*), whether Boricua Broadcasting Corporation is financially qualified to construct and operate its proposed station.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[6] The Board's authority to consider matters on its own motion has been well established. See *Athens Broadcasting Co., Inc.*, 37 FCC 2d 374, 388, 25 RR 2d 483, 500 (1972); *Charles County Broadcasting Co., Inc.*, FCC 63–821, 25 RR 903, 906 (1963).

[7] Boricua's estimated first-year costs of $434,000 only included that portion of its $152,500 equipment costs, *i.e.*, down payment, principal and interest, which must be paid in the first year and, therefore, Boricua is not entitled to use the $67,497 in deferred credit in determining its financial resources to meet first-year construction and operating costs.

FCC 74-416

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In Re Applications of | |
|---|---|
| CENTRE VIDEO CORP. | |
| ALIQUIPPA BOROUGH, PA. | CAC-1994 PA131 |
| CENTER TOWNSHIP, PA. | CAC-1995 PA699 |
| HOPEWELL TOWNSHIP, PA. | CAC-1996 PA151 |
| SOUTH HEIGHTS BOROUGH, PA. | CAC-1997 PA166 |
| AMBRIDGE BOROUGH. PA. | CAC-1998 PA132 |
| BADEN BOROUGH, PA. | CAC-1999 PA133 |
| BELL ACRES BOROUGH, PA. | CAC-2000 PA692 |
| CONWAY BOROUGH, PA. | CAC-2001 PA142 |
| ECONOMY BOROUGH, PA. | CAC-2002 PA703 |
| EDGEWORTH BOROUGH, PA. | CAC-2003 PA145 |
| HARMONY TOWNSHIP, PA. | CAC-2004 PA149 |
| HAYSVILLE BOROUGH, PA. | CAC-2005 PA704 |
| LEETSDALE BOROUGH, PA. | CAC-2006 PA153 |
| LEET TOWNSHIP, PA. | CAC-2007 PA154 |
| OSBORNE BOROUGH, PA. | CAC-2008 PA160 |
| SEWICKLEY BOROUGH, PA. | CAC-2009 PA165 |
| WHITE OAK BOROUGH, PA. | CAC-2010 PA532 |
| MCKEESPORT, PA. | CAC-2011 PA527 |
| VERSAILLES BOROUGH, PA. | CAC-2012 PA531 |
| ELIZABETH TOWNSHIP, PA. | CAC-2013 PA525 |
| CARNEGIE BOROUGH, PA. | CAC-2014 PA508 |
| CRAFTON BOROUGH, PA. | CAC-2015 PA509 |
| INGRAM BOROUGH, PA. | CAC-2016 PA510 |
| ROSSLYN FARMS BOROUGH, PA. | CAC-2017 PA62B |
| THORNBURG BOROUGH, PA. | CAC-2018 PA63B |
| COLLIER TOWNSHIP, PA. | CAC-2019 PA64B |
| SCOTT TOWNSHIP, PA. | CAC-2020 PA65B |
| HEIDELBERG BOROUGH, PA. | CAC-2021 PA66B |
| BRIDGEVILLE BOROUGH, PA. | CAC-2022 PA67B |
| GREENTREE BOROUGH, PA. | CAC-2023 PA68B |
| STOWE TOWNSHIP, PA. | CAC-2024 PA717 |
| MCKEES ROCKS BOROUGH, PA. | CAC-2025 PA528 |
| CASTLE SHANNON BOROUGH, PA. | CAC-2026 PA698 |
| BALDWIN BOROUGH, PA. | CAC-2027 PA693 |
| WHITEHALL BOROUGH, PA. | CAC-2028 PA889 |
| BRENTWOOD BOROUGH, PA. | CAC-2029 PA71B |
| SOUTH PARK TOWNSHIP, PA. | CAC-2030 PA72B |
| ROSS TOWNSHIP, PA. | CAC-2031 PA714 |
| AVALON BOROUGH, PA. | CAC-2032 PA694 |
| BEN AVON BOROUGH, PA. | CAC-2033 PA696 |
| EMSWORTH BOROUGH, PA. | CAC-2034 PA701 |
| MCCANDLESS TOWNSHIP, PA. | CAC-2035 PA709 |

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|---|---|
| Millvale Borough, Pa. | CAC–2036 PA710 |
| Reserve Township, Pa. | CAC–2037 PA713 |
| West View Borough, Pa. | CAC–2038 PA173 |
| Bellevue Borough, Pa. | CAC–2039 PA695 |
| Penn Hills Township, Pa. | CAC–2040 PA162 |
| Wilkinsburg Borough, Pa. | CAC–2041 PA176 |
| Braddock Hills Borough, Pa. | CAC–2042 PA697 |
| Edgewood Borough, Pa. | CAC–2043 PA702 |
| Forest Hills Borough, Pa. | CAC–2044 PA705 |
| Glassport Borough, Pa. | CAC–2045 PA148 |
| Clairton, Pa. | CAC–2046 PA139 |
| Duquesne, Pa. | CAC–2047 PA144 |
| Dravosburg Borough, Pa. | CAC–2048 PA143 |
| Elizabeth Borough, Pa. | CAC–2049 PA146 |
| Jefferson Borough, Pa. | CAC–2050 PA706 |
| Liberty Borough, Pa. | CAC–2051 PA155 |
| Lincoln Borough, Pa. | CAC–2052 PA707 |
| Port Vue Borough, Pa. | CAC–2053 PA163 |
| West Elizabeth Borough, Pa. | CAC–2054 PA174 |
| Carroll Township, Pa. | CAC–2055 PA522 |
| Donora Borough, Pa. | CAC–2056 PA524 |
| Monongahela, Pa. | CAC–2057 PA529 |
| Charleroi Borough, Pa. | CAC–2058 PA523 |
| North Charleroi Borough, Pa. | CAC–2059 PA530 |
| Monessen, Pa. | CAC–2060 PA084 |
| New Eagle Borough, Pa. | CAC–2061 PA085 |
| Belle Vernon Borough, Pa. | CAC–2062 PA083 |
| North Belle Vernon Borough, Pa. | CAC–2063 PA086 |
| Speers Borough, Pa. | CAC–2064 PA82B |
| Rostraver Township, Pa. | CAC–2065 PA715 |
| Forward Township, Pa. | CAC–2066 PA83B |
| Fallowfield Township, Pa. | CAC–2067 PA700 |
| Fox Chapel Borough, Pa. | CAC–2068 PA84B |
| O'Hara Township, Pa. | CAC–2069 PA89B |
| Aspinwall Borough, Pa. | CAC–2070 PA85B |
| Shaler Township, Pa. | CAC–2071 PA716 |
| Washington Channels, Inc. | |
| Washington, Pa. | CAC–2072 PA610 |
| North Franklin Township, Pa. | CAC–2073 PA608 |
| East Washington Borough, Pa. | CAC–2074 PA607 |
| Canton Township, Pa. | CAC–2075 PA606 |
| South Strabane, Pa. | CAC–2076 PA609 |
| Amwell Township, Pa. | CAC–2077 PA86B |
| National Cable Television Corp. | |
| Scottsdale Borough, Pa. | CAC–2078 PA409 |
| Mount Pleasant Borough, Pa. | CAC–2079 PA762 |
| Everson Borough, Pa. | CAC–2080 PA763 |
| Mount Pleasant Township, Pa. | CAC–2081 PA760 |
| East Huntington Township, Pa. | CAC–2082 PA761 |
| City of Connellsville, Pa. | CAC–2083 PA408 |
| Connellsville Township, Pa. | CAC–2084 PA756 |

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|---|---|
| South Connellsville Borough, Pa. | CAC–2085 PA757 |
| Dunbar Township, Pa. | CAC–2086 PA759 |
| Dunbar Borough, Pa. | CAC–2087 PA758 |
| Upper Tyrone Township, Pa. | CAC–2088 PA764 |
| Armstrong Utilities, Inc. | |
| Butler, Pa. | CAC–2089 PA050 |
| Butler Township, Pa. | CAC–2090 PA751 |
| Center Township, Pa. | CAC–2091 PA752 |
| Bethel Park TV Cable Co., Inc. | |
| Bethel Park, Pa. | CAC–2092 PA87B |
| Dynamic Cablevision, Inc. | |
| Homestead Borough, Pa. | CAC–2093 PA664 |
| West Homestead Borough, Pa. | CAC–2094 PA667 |
| Whitaker Borough, Pa. | CAC–2095 PA668 |
| Munhall Borough, Pa. | CAC–2096 PA665 |
| West Mifflin Borough, Pa. | CAC–2097 PA666 |
| Pleasant Hills Borough, Pa. | CAC–2098 PA88B |
| For Certificates of Compliance | |

Memorandum Opinion and Order

(Adopted April 17, 1974; Released May 1, 1974)

By the Commission:

1. On February 23, 1973, the above-captioned multiple system operators filed for certificates of compliance [1] to add television broadcast stations WKBF–TV (Ind.), Cleveland, Ohio, WUAB (Ind.), Lorain, Ohio, and WOR–TV (Ind.), New York, New York, to 105 cable television systems located in the Pittsburgh, Pennsylvania area.[2] In addition, the systems which operate from the headend located at the City of Connellsville (headend #13) seek certification for the carriage of television broadcast station WPIX (Ind.), New York, New York. All of the systems commenced operation prior to March 31, 1972, and are presently carrying the following television signals:

KDKA–TV (CBS, Channel 2), Pittsburgh, Pa.
WTAE–TV (ABC, Channel 4), Pittsburgh, Pa.
WIIC–TV (NBC, Channel 11), Pittsburgh, Pa.
WQED (Educational, Channel 13), Pittsburgh, Pa.
WQEX [3] (Educational, Channel 16), Pittsburgh, Pa.
WJAR–TV (NBC, Channel 6), Johnstown, Pa.
WTRF–TV (NBC, Channel 7), Wheeling, W. Va.
WSTV–TV (CBS/NBC, Channel 9), Steubenville, Ohio

[1] Attachment A to this Memorandum Opinion and Order contains a list of the subject systems noting common headends, the population and number of subscribers per community, and the date on which service commenced.

[2] All of the communities are located in the Pittsburgh, Pennsylvania major television market (#10) with the exception of those systems operating from the headend located at the City of Connellsville (headend #13), which are located outside all television markets.

[3] The systems which operate from the headend located in the City of Butler (headend #14) do not carry WQEX.

The systems which operate from the headends located at Aliquippa Borough (headend #1) and the City of Butler (headend #14) provide their subscribers with the following additional television signals:

WKBN–TV (CBS, Channel 27), Youngstown, Ohio
WYTV (ABC, Channel 33), Youngstown, Ohio
WFMJ–TV (NBC, Channel 21), Youngstown, Ohio

On November 19, 1973, the subject cable systems amended their applications to delete the carriage of Station WOR–TV.

2. The applications are opposed by: WYTV, Inc., licensee of television broadcast station WYTV, Youngstown, Ohio,[4] WIIC–TV Corporation, licensee of Station WIIC–TV, Pittsburgh, Pennsylvania; The Hearst Corporation, licensee of Station WTAE–TV, Pittsburgh, Pennsylvania; Rust Craft Broadcasting Company, licensee of Station WSTV–TV, Steubenville, Ohio; Forward Tele-Productions, Inc., licensee of Station WTRF–TV, Wheeling, West Virginia; Westinghouse Broadcasting Company, Inc. (Group W), licensee of KDKA–TV, Pittsburgh, Pennsylvania.[5] All of these oppositions are directed solely against the cable systems request to carry WOR–TV. Since all of the applications were amended to delete this signal, the oppositions are thus moot and will be dismissed. Carriage of the remaining signals is consistent with the Rules.

3. Major market cable television systems in operation prior to March 31, 1972 and wishing to add two distant independent signals to their carriage complement must provide a public and an educational access channel for each community pursuant to Section 76.251(c) of the Rules. The six applicants recognize their obligation to initiate access services but have requested a waiver of Section 76.251(c) to permit them to provide only one public access channel together with production facilities and one education access channel for each of their fourteen multiple system headends operating within the Pittsburgh major television market.[6] Under this proposal, the 16 systems served by the Aliquippa headend will share two access channels and facilities, as will the 13 systems served by the Carroll headend, the 10 systems served by each of the Carnegie and Glassport headends, the 9 systems served by the Ross headend, the 6 systems served by the Washington and Homestead headends, the 5 systems served by each of the Castle Shannon, Penn Hills, and Scottsdale headends, the 4 systems served by each of the White Oak and Fox Chapel headends, the 3 systems served by the Bulter headend, and the 2 systems served by the Stowe headend.

4. In support of their waiver request, the applicants argue that the capital costs of substantially rebuilding the systems on a hub basis necessary to accommodate separate access channels for each system and of equipping and providing personnel for separate studio facilities

[4] WYTV's opposition is only directed against the systems operating from the headends at Aliquippa Borough (headend #1) and the City of Butler (headend #14).

[5] Westinghouse did not direct oppositions against systems operating from the headend located in the City of Connellsville (headend #13).

[6] The systems operating from the headend located in the City of Connellsville (headend #13) do not join in this waiver request. These systems are located outside of all markets and need not comply with Section 76.251 of the Rules.

(estimated at $5000 per community) would be prohibitively expensive, particularly in view of the small number of subscribers served by most of the systems. Additionally, each of the relevant headends is located in areas marked by increasing emphasis upon joint and regional cooperative efforts in providing such community services as education, public transportation, fire, and pollution control. As a consequence of the regionalization of public services in these cable communities, the applicants maintain that there is a need for communication between the communities, which can best be met by consolidating access channels and providing centralized studio facilities for each headend. These facilities would be situated within 15 minutes driving time of all communities served by the respective headends and can be more fully equipped and staffed than individual studios for each community. In the event use of the conglomerate access channels becomes saturated, the applicants promise to activate additional channels pursuant to Section 76.251(a)(8) of the Rules. In addition, Centre Video Corporation, which operates 10 of these headends, serving 78 of the subject communities, plans to provide a central master studio equipped with color production facilities comparable to those of a television station and a mobile unit capable of providing live on-location coverage of area events. The master studio will be interconnected by short haul microwave with all of Centre Video's local studios.

5. In adopting our access cablecasting rules for systems in major markets, we recognized that they might present problems for existing conglomerate systems serving separate communities from a common headend.[7] We particularly noted the sizable capital outlays which would be incurred if these systems were required at this time to undergo the radical redesigning and rebuilding necessary to provide separate access facilities for each community. Accordingly, we have granted partial waivers of Section 76.251(c) upon detailed showings that it would be technically and economically unfeasible to construct separate access facilities at present, and that individuals living in the communities served would not, to any significant extent, be deprived of access services they would receive if separate facilities were provided. *People's Cable Corp.*, FCC 74–123, 45 FCC 2d 367; *Cable TV of York*, 40 FCC 2d 927 (1973); *Gerity Broadcasting Company*, 36 FCC 2d 326 (1973). We believe that the showings submitted by the applicants are consistent with our previous decisions concerning the sharing of access channels and production facilities by existing conglomerate systems, and warrant granting a waiver at least until the expiration of the certificates to be issued at this time. However, we believe that more data must be supplied before the question of permanent waiver (which is what the applicants request and what Para. 90 of the *Reconsideration of Cable Television Report and Order*, *supra*, envisions) can be decided. Hence, when the systems apply for recertification pursuant to Section 76.11(d), we will expect them to submit detailed information concerning such matters as the results of the temporary waiver we are granting herein and the costs of pro-

[7] Para. 147, *Cable Television Report and Order*, 36 FCC 2d 143, 197 (1972); Para. 90, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 359 (1972).

viding full compliance with Section 76.251, and will revisit the waiver issues at that time.[8]

6. There is one final matter that requires consideration. The franchise for the City of Butler expired on April 8, 1973, and is currently being renegotiated. Accordingly, we are deferring the issuance of a certificate of compliance for the system serving Butler. Upon the submission of a franchise meeting the requirements of Section 76.31 of the Rules, the Cable Television Bureau will be authorized to issue a certificate of compliance, pursuant to delegated authority.

For the foregoing reasons, we find that a partial waiver of Section 76.251 of the Commission's Rules and a grant of the subject applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Applications for Certificates of Compliance" filed by WYTV, Inc., licensee of Television Broadcast Station WYTV, Youngtown, Ohio, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Objections to Applications for Certificates of Compliance" filed by WIIC–TV Corporation, licensee of Station WIIC–TV, Pittsburgh, Pennsylvania, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Opposition to Applications for Certificates of Compliance" filed by the Hearst Corporation, licensee of Station WTAE–TV, Pittsburgh, Pennsylvania, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Opposition to Applications for Certificates of Compliance" filed by Rust Craft Broadcasting Company, licensee of Station WSTV–TV, Steubenville, Ohio, IS DISMISSED.

IT IS FURTHER ORDERED, That the "Oppositions of Forward Tele-Productions, Inc." filed by Forward Tele-Productions, Inc., licensee of Station WTRF–TV, Wheeling, West Virginia, IS DISMISSED.

IT IS FURTHER ORDERED, That "Opposition to Applications for Certificates of Compliance" filed by Westinghouse Broadcasting Company, Inc. (Group W), licensee of Station KDKA–TV, Pittsburgh, Pennsylvania, IS DISMISSED.

[8] The franchises for the municipalities listed below will expire prior to March 31, 1977. Our certification for these systems will expire simultaneously with the expiration date of the franchises, consistent with Section 76.11(d). All other certifications will expire on March 31, 1977.

| Municipalities | CAC and code No. | Expiration date |
|---|---|---|
| White Oak Borough | CAC–2010, PA532 | Feb. 21, 1976 |
| Stowe Township | CAC–2024, PA717 | May 10, 1975 |
| McKees Rocks Borough | CAC–2025, PA528 | Feb. 4, 1975 |
| Brentwood Borough | CAC–2029, PA71B | July 6, 1976 |
| West View Borough | CAC–2038, PA173 | May 13, 1974 |
| Clairton | CAC–2046, PA139 | Dec. 23, 1975 |
| Carroll Township | CAC–2055, PA522 | Dec. 30, 1975 |
| Donora Borough | CAC–2056, PA524 | Mar. 17, 1975 |
| Monongahela, city | CAC–2057, PA529 | May 12, 1975 |
| Charleroi Borough | CAC–2058, PA523 | Aug. 11, 1975 |
| North Charleroi Borough | CAC–2059, PA530 | Feb. 8, 1975 |
| Belle Vernon Borough | CAC–2062, PA083 | Mar. 13, 1977 |
| Rostraver Township | CAC–2065, PA715 | Feb. 2, 1975 |
| Fallowfield Township | CAC–2067, PA700 | Oct. 1, 1976 |

IT IS FURTHER ORDERED, That the "Application[s] for Certificate[s] of Compliance" (CAC–1994–2701), filed by Centre Video Corporation, ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the "Application[s] for Certificate[s] of Compliance" (CAC–2072–2077), filed by Washington Channels, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the "Application[s] for Certicate[s] of Compliance" (CAC–2078–2088), filed by National Cable Television Corporation, ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the "Application[s] for Certificate[s] of Compliance" (CAC–2090–2091), filed by Armstrong Utilities, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–2092), filed by Bethel Park TV Cable Co., Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Application[s] for Certificate[s] of Compliance" (CAC–2093–2098), filed by Dynamic Cablevision, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That final processing of the "Application for Certificate of Compliance" (CAC–2089), filed by Armstrong Utilities, Inc., IS HELD IN ABEYANCE, subject to further proceedings consistent with Paragraph 6 above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-405

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Application of<br>CHAMPLAIN CABLEVISION, INC., TOWN OF MOREAU, N.Y.<br>For Certificate of Compliance | CAC-779<br>NY406 |

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released May 1, 1974)

BY THE COMMISSION:

1. On June 16, 1972, Champlain Cablevision, Inc., hereafter referred to as Champlain, filed the above-captioned application for a certificate of compliance to construct and operate a cable television system at the Town of Moreau, New York.[1] Champlain proposes to supply subscribers with the signals of the following television broadcast stations:

WAST (ABC, Channel 13) Albany, N.Y.
WRGB (NBC, Channel 6) Schenectady, N.Y.
WTEN (CBS, Channel 10) Albany, N.Y.
WMHT (Educational, Channel 17) Schenectady, N.Y.
WOR-TV (Independent, Channel 9) New York, N.Y.
WPIX (Independent, Channel 11) New York, N.Y.

2. Champlain's application is opposed by Sonderling Broadcasting Corporation, licensee of WAST, Albany, New York; Albany Television, Inc., licensee of WTEN, Albany, New York; Mohawk-Hudson Council on Educational TV, Inc., licensee of WMHT, Schenectady, New York; the University of Vermont, licensee of WVER, Rutland, Vermont; and Faith Center, licensee of WHCT-TV, Hartford, Connecticut. Additionally, Champlain has requested a permanent waiver of the access provisions of Section 76.251.

3. In their oppositions, Sonderling and Albany Television object to Champlain's proposal to carry the signals of WOR-TV and WPIX and contend that such carriage would be in direct contravention of the leapfrogging provisions set forth in Section 76.61(b)(2)(i) of our Rules. In *Commission on Cable Television of the State of New York*, FCC 73-1148, 43 FCC 2d 826 (1973), *recons. denied*, FCC 74-99, 45 FCC 2d 283 (1974), we granted a waiver of that section to allow cable systems in the Albany-Schenectady-Troy television market to carry the signals of two independent stations licensed to New York City. That action is dispositive of the leapfrogging issues raised by Sonderling and Albany Television, and, accordingly, their objections will be dismissed as moot.

4. Mohawk-Hudson's objection was predicated on Champlain's

[1] The Town of Moreau is located partially within the specified zone of the 34th-ranked Albany-Schenectady-Troy, New York, television market.

original request to carry WVER (Educ., Channel 28), Rutland, Vermont. Mohawk contends that carriage of WVER within the "primary service area" of Mohawk's WMHT, Schenectady, would have a serious economic impact on the latter station. In response to Mohawk's objection, Champlain amended its application on November 20, 1973, to delete its request to carry WVER. This deletion has rendered Mohawk's arguments moot, and its objection will be dismissed as such. The amendment prompted the objection of the University of Vermont, licensee of WVER, however.[2] The University contended, correctly, that because WVER places a predicted Grade B contour over the Town of Moreau, the station has requested, and is entitled to, carriage of the applicant's cable television system. After filing this objection, the University entered into negotiations with Mohawk. These negotiations resulted in an "understanding" pursuant to which the University requested that its above-mentioned objection be withdrawn. Although we note that an "understanding" such as that just described will be given no effect in altering the signal carriage rights of the educational stations involved or the right of the applicant to request carriage of those stations, we will, because the interested parties are in agreement at the present time, dismiss the University's objection as moot. Should the applicant choose at some later point to request carriage of WVER, such a request will be considered on its own merits without reference to the above-mentioned agreement.

5. Faith Center, in its "Response," states that it has no objection to Champlain's carriage of the New York City independents "so long as WHCT–TV [Ind., Channel 18] is carried to the full extent provided in the Commission's Rules." Pursuant to Section 76.61(b)(2), Champlain may, at some later point, choose to request carriage of a third independent station.[3] Nothing in our Rules requires Champlain to carry the distant signal of WHCT–TV, however, and Faith Center's objections to the leapfrogging of its station by cable systems in the Albany-Schenectady-Troy market have been adequately dealt with by this Commission in *Commission on Cable Television of the State of New York*, *supra*. Faith Center's objection to Champlain's signal carriage proposal must therefore be denied.

6. Although the Town of Moreau is located partially within a major television market, Champlain has requested that its cable system in this community be permanently and completely excused from complying with any of the access and nonbroadcast requirements set forth in Section 76.251. Champlain contends that the physical and demographic characteristics of the town present a "unique situation" in that the majority of the town's residents live beyond the 35-mile zone of the Albany-Schenectady-Troy market. The applicant argues further that because of the "limited number of potential subscribers in Moreau,"[4] an economically viable cable system cannot be constructed if it is compelled to adhere to the requirements of Section 76.251. Finally, Champlain alleges that because it proposes to construct the captioned system as an extension of existing systems, which were built without

[2] The University's objection was filed on January 3, 1974.

[3] If Champlain chooses to add a third independent, it must select an independent UHF station located within 200 air miles from the Town of Moreau, if one is available. Champlain originally requested carriage of WNEW–TV, New York City. In the amendment filed November 20, 1973, this request was deleted.

[4] The population of the town is 10,411 (1970 census).

access facilities,[5] such facilities could not be provided for this system without either rebuilding the existing systems or constructing an entirely separate operation to serve the town, either alternative requiring "prohibitive expenditures that would prevent establishment of cable television service for the residents of Moreau."

7. In adopting our access rules, we limited their applicability to cable systems located within the major television markets because we had afforded these systems certain signal carriage benefits which, we hoped, would stimulate cable growth. We concluded that this growth should be accompanied by the construction and maintenance of facilities designed to open new channels of communications to and between residents of the communities served by these systems. Para. 147, *Cable Television Report and Order*, 36 FCC 2d 143 (1972). While we recognized that our Rules could pose problems for systems constructed in small communities within major markets, we indicated that such problems could be overcome "through joint building and related programs" with cable operators in the larger core areas. *Ibid.* We have, in the past, granted partial and temporary relief from the access requirements of our Rules upon sufficient showings of the economic hardships that would be incurred by system operators if immediate and strict compliance was mandated. *Stark County Communications, Inc.*, FCC 72–1189, 38 FCC 2d 1147 (1972); *Sammons Communications, Inc.*, FCC 73–363, 40 FCC 2d 461 (1973). We have fashioned our relief, however, to insure that subscribers will not be significantly deprived of access services they would receive if Section 76.251 was strictly complied with. *TelePrompTer of Portsmouth, Inc.*, FCC 73–1207, 43 FCC 2d 1232 (1973), and we have been extremely reluctant to afford total relief from our access requirements. *See, e.g., Cable TV of York*, FCC 73–459, 40 FCC 2d 927 (1973).

8. We have concluded that we would not be serving the public interest by certifying the construction and operation of a major market system that proposes to provide its subscribers with none of the access facilities and services required by our Rules. We are not, we should note, precluding the possibility that Champlain may seek to meet its access obligations through something short of strict compliance with the Rules, and our action today will be without prejudice to its reconsideration upon submission of an acceptable access proposal or, alternatively, a request for relief that is consonant with previous Commission precedents in this area. *See Leacom, Inc.*, FCC 73–292, 40 FCC 2d 129, *recons. granted*, FCC 73–412, 40 FCC 2d 693, (1973).

Accordingly, IT IS ORDERED, That the oppositions filed by Sonderling Broadcasting Corporation, Albany Television, Inc., Mohawk-Hudson Council on Educational Television, Inc., and the University of Vermont, ARE DISMISSED as moot.

IT IS FURTHER ORDERED, That the opposition filed by Faith Center IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application for a certificate of compliance, filed by Champlain Cablevision, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[5] Champlain's existing systems are located in communities surrounding Moreau, beyond the specified zone of any television market.

FCC 74-427

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In Re | |
|---|---|
| CLEAR TELEVISION CABLE CORP., BERKLEY TOWNSHIP, N.J. | Docket No. 20039<br>CSC-75 (NJ086) |
| CLEAR TELEVISION CABLE CORP., BEACHWOOD BOROUGH, N.J. | Docket No. 20040<br>CSC-75 (NJ091) |
| CLEAR TELEVISION CABLE CORP., OCEAN GATE, N.J., PINE BEACH, N.J., SOUTH TOMS, N.J. | NJ141<br>NJ140 |
| Request for Declaratory Ruling | |

MEMORANDUM OPINION AND ORDER AND ORDER TO SHOW CAUSE

(Adopted April 17, 1974; Released May 1, 1974)

BY THE COMMISSION:

1. On December 11, 1973, Clear Television Cable Corporation, operator of proposed cable television systems at Ocean Gate, Pine Beach, and South Toms River, New Jersey,[1] filed a "Petition for a Declaratory Ruling", seeking a ruling on Clear Television's signal carriage duties on these proposed systems pursuant to Section 76.57 of the Commission's Rules.[2] On January 8, 1974, and on January 10, 1974, respectively, Taft Broadcasting Company, licensee of WTAF-TV, Philadelphia, Pennsylvania, and WPHL-TV, Inc., licensee of WPHL-TV, Philadelphia, Pennsylvania, filed an "Opposition to Petition for Declaratory Ruling."

2. Clear Television also operates existing cable television systems at Berkley Township and Beachwood Borough, New Jersey. On February 19, 1974, Westinghouse Broadcasting Company, Inc., licensee of KYW-TV, Philadelphia, Pennsylvania, filed a "Petition for Order to Show Cause" (CSC-75), asking that an Order to Show Cause issue against Clear Television for violation of Section 76.57 of the Rules on the existing cable television systems. On March 4, 1974, Clear Television filed an "Opposition to Petition for Order to Show Cause," and March 22, 1974, Westinghouse Broadcasting filed a "Reply to Opposition to Petition for Order to Show Cause." Clear Television operates 30 channel cable television systems at Berkley Township and Beach-

[1] We do not rule on Clear Television's pending applications for certificates of compliance for its proposed cable television systems at Ocean Gate, Pine Beach, and South Toms River, New Jersey.

[2] Clear Television's request for a declaratory ruling thus deals only with its proposed cable television systems at Ocean Gate, Pine Gate, and South Toms, New Jersey. As indicated in Par. 2, *infra*, the pending petition for Orders to Show Cause is directed against only Clear Television's operating cable television systems at Berkley Township and Beachwood Borough, New Jersey.

wood Borough, New Jersey, and offers the following television broadcast signals to approximately 2,230 subscribers:

WHYY–TV (Educational), Wilmington, N.J.
WKBS–TV (Independent), Burlington, N.J.
WNET (Educational), Newark, N.J.
WNJT (Educational), Trenton, N.J.
WABC–TV (ABC), New York, N.Y.
WCBS–TV (CBS), New York, N.Y.
WNBC–TV (NBC), New York, N.Y.
WNEW–TV (Independent), New York, N.Y.
WOR–TV (Independent), New York, N.Y.
WPIX (Independent), New York, N.Y.
KYW–TV (NBC), Philadelphia, Pa.
WCAU–TV (CBS), Philadelphia, Pa.
WPHL–TV (Independent), Philadelphia, Pa.
WPVI–TV (ABC), Philadelphia, Pa.
WTAF–TV (Independent), Philadelphia, Pa.

Clear Television's signal carriage proposal for Pine Beach, Ocean Gate, and South Toms, New Jersey, is identical to the above, because the proposed systems would operate from a headend in Berkley Township.

3. The existing systems at Berkley Township and Beachwood Borough and the proposed systems at Pine Beach, Ocean Gate, and South Toms River serve communities located outside all television markets. Pursuant to Section 76.57 of the Rules, they therefore must carry on request any television broadcast station which places a predicted Grade B or better contour over these communities. Sixteen television broadcast stations do this. Clear Television offers fifteen signals to its subscribers in two ways. For the basic fee of $5.00 per month Clear Television provides its subscribers with composite carriage of fifteen signals on the twelve VHF channels. Some stations, including KYW–TV, necessarily are carried on a part-time basis. Clear Television deletes the network programming of the Philadelphia affiliates when the programming simultaneously duplicates a New York City station's network programming, and in its place carries the Philadelphia independent stations. For the basic monthly fee, plus a surcharge of $1.50 per month, Clear Television installs a converter which permits full time reception of all fifteen signals.

4. Westinghouse Broadcasting contends that Clear Television's part-time carriage of KYW–TV on Clear Television's existing Berkley Township and Beachwood Borough cable television systems violates Section 76.57 of the Rules. Westinghouse Broadcasting argues that since KYW–TV and WNBC–TV are of equal priority, neither station is entitled to exclusivity protection against the other. Westinghouse Broadcasting also maintains that Clear Television violates the rule by requiring a surcharge for the converters which are necessary to receive full time all stations that are entitled to carriage based on *Columbia Television Company, Inc.*, FCC 73–903, 42 FCC 2d 674.

5. Clear Television admits that it must carry KYW–TV and that it carries the station on a shared channel basis. Clear Television offers no justification for its part-time carriage of KYW–TV, but states that it will carry KYW–TV full time when the New Jersey Public Utilities

Commission authorizes it to begin serving new areas of Berkley Township and Beachwood Borough. Clear Television does not suggest that the New Jersey Commission has required part-time carriage for KYW–TV.[3] Clear Television's cable television systems are required on request to carry KYW–TV, and therefore, must carry it full time. See *LVO Cable, Inc.*, FCC 73–190, 39 FCC 2d 784.

6. Clear Television argues that providing converters only to subscribers who choose to pay the $1.50 per month surcharge is not contrary to our decision in *Columbia Television Company, Inc., supra.* Clear Television contends that the surcharge is for hardware and not for programming, and that *Columbia* did not deal with a situation where converters are necessary to receive cable television service in excess of twelve channels. Since the cost of the converters must be passed on to the subscribers, Clear Television argues that its subscribers should be able to decide whether or not to pay this additional cost.

7. We find that Clear Television's optional surcharge violates Section 76.57 of the Rules and is contrary to the policy enunciated in the *Columbia* case. In *Columbia* we reasoned that "must-carry" stations should not be denied access to the audience they are licensed to serve, regardless of the subscribers' financial relation with the system. Since Clear Television must carry on request the signals of fifteen television broadcast stations, and since we have ruled that these signals must be carried full time, four of the stations will be cut off periodically from the subscribers who elect not to pay the surcharge. Clear Television must provide converters or other appropriate equipment to all of its subscribers, so that they have actual full-time access to all television stations which Clear Television must carry. Our decision does not circumscribe an individual's decision to subscribe or not to subscribe. Nor does it dictate Clear Television's method of meeting the cost of the necessary equipment.

8. We realize that compliance with our decision may necessitate a substantial capital investment, however, which Clear Television may be unable to make immediately. If Clear Television believes that immediate compliance with our decision would jeopardize its viability, it may request a temporary waiver of Section 76.57. Such a request should specify the duration of the requested waiver and should detail Clear Television's plans to comply with the rules.[4] Clear Television may request such a waiver and introduce relevant evidence at the hearing on the Order to Show Cause. The Administrative Law Judge shall grant a temporary waiver if he considers it warranted. This procedure will permit an informed and expeditious disposition of this case.

9. Our decision on the issues raised by Westinghouse Broadcasting's "Petition for Order to Show Cause" disposes of the issues on which Clear Television requested a Declaratory Ruling.

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[3] As a matter of fact, the relevant New Jersey statute provides that cable television systems must be:

"(r)eady, willing, and able to comply with all applicable rules and regulations imposed by or pursuant to State or Federal law as preconditions for engaging in the proposed CATV operations. (N.J.S.A. 48:5A–17a.)"

[4] In Paragraphs 104 and 106 of the Second Report and Order in Docket Nos. 14895, 15233, 15971, 2 FCC 2d 725 (1966), the Commission recognized that immediate compliance with signal carriage requirements could threaten the economic life of some cable television systems and stated that it would entertain individual requests for temporary waiver of the rules.

Accordingly, IT IS ORDERED, That pursuant to Sections 312(b) and (c) and 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. 312(b) and (c), and 409(a), Clear Television Cable Corporation, IS DIRECTED TO SHOW CAUSE why it should not be ordered to cease and desist from further violation of Section 76.57 of the Commission's Rules and Regulations on its cable television systems at Berkley Township and Beachwood Borough, New Jersey.

IT IS FURTHER ORDERED, That Clear Television Cable Corportion IS DIRECTED to appear and give evidence with respect to the matters described above at a hearing to be held at Washington, D.C., at a time and place before an Administrative Law Judge to be specified by subsequent Order, unless the hearing is waived, in which event a written statement may be submitted.

IT IS FURTHER ORDERED, That Westinghouse Broadcasting Company, Inc., and Chief, Cable Television Bureau, ARE MADE parties to this proceeding.

IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this Order by Certified Mail to Clear Television Cable Corporation.

IT IS FURTHER ORDERED, That the "Request for Declaratory Ruling" filed by Clear Television Cable Corporation on December 11, 1973, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Petition for Declaratory Ruling" filed by Taft Broadcasting Company on January 8, 1974, IS GRANTED.

IT IS FURTHER ORDERED, That the "Opposition to Petition for Declaratory Ruling" filed by WPHL–TV, Inc., on January 10, 1974, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In Re Complaint of
HORACE P. ROWLEY III
Concerning the Fairness Doctrine Involving WNJU–TV, Newark, N.J.

APRIL 29, 1974.

HORACE P. ROWLEY III, Esq.,
*416 East 81st Street,*
*New York, N.Y. 10028.*

DEAR MR. ROWLEY: This is in reference to your complaint filed January 29, 1974 alleging violation of the fairness doctrine by WNJU–TV, Newark, New Jersey. In particular, you allege that the licensee presented only one side of a controversial issue of public importance during the Black New Ark program of December 29, 1973 when the "ideology of Pan-Africanism" was discussed. You attached copies of various documents including copies of your correspondence with the station.

In your letter to WNJU–TV dated December 29, 1973 you stated that Imamu Amiri Baraka, host of the Black New Ark program, interviewed Molly Kanasa concerning the ideology of Pan-Africanism and Kwanza, the Pan-African Festival of Harvest; that they discussed the host's revolutionary value system for "gaining, maintaining and using power" for African people; that they viciously attacked Christmas by referring to it as "X-mas" and claiming that it represented only money and "conspicious consumption"; and that, according to the FBI, Pan-Africanism was being exploited by black extremists for the violent overthrow of capitalism and the United States Government, and that, therefore, Pan-Africanism was a controversial issue of public importance.

In its response to you of January 10, 1974, WNJU–TV stated that it did not believe a controversial issue of public importance had been discussed; that even so, the fairness doctrine did not require the immediate presentation of contrasting views; that the program dealt solely with the meaning and celebration of Kwanza; that there was no mention of Pan-Africanism; that the celebration of the festival was more visible today because it represented a relevant cultural expression for Blacks; that the festival served to focus on Blacks the goals of unity and national liberation; that Kwanza was a seven day celebration which was family oriented and hopefully would not be saddled with some of the excess commercialism associated with Christmas; that only the festival and its relevance to Blacks was discussed; and that such a program was no different than a Christmas program for Christians or a Chanukah program for Jews.

In your complaint to the Commission, you stated that WNJU–TV was unreasonable in claiming that the ideology of Pan-Africanism was not discussed; that the host discussed the ideology of Pan-Africanism in the context of Kwanza; that no conflicting views have been presented in the English language; that WNJU–TV had not denied that Pan-Africanism was a controversial issue of public importance or that it had not presented conflicting views in its overall programming; that in addition to the FBI 1973 Annual Report three articles written by the program host in an ethnic newspaper "clearly refer to the ideology of Pan-Africanism and prove the controversiality and importance of the issue to metropolitan New York"; that the program host, through his articles, urged all blacks to unify under "Nationalism, Pan-Africanism and Socialism (Ujamma)" because other groups sought to repress the unity of Blacks everywhere; and that WNJU–TV was avoiding the fairness doctrine by not presenting a discussion of conflicting views.

Initially, whether or not any given problem is a controversial issue of public importance is determined by the individual licensee. Paragraph 10 of the *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949), states, in part:

> . . . The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. . . .

When a fairness doctrine complaint is made to the Bureau, the burden is on the complainant to supply specific information indicating a *prima facie* case of violation including (1) the specific issue of a controversial nature of public importance; (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the station's local area at the time of the broadcast; and (3) reasonable grounds for the claim that the station broadcast only one side of the issue in its overall programming. See *Allen C. Phelps*, 21 FCC 2d 12 (1969).

Generally, the Commission will review a licensee's decisions pursuant to the fairness doctrine only to determine whether the licensee has acted reasonably under all the facts and circumstances presented.

The issues here are whether the ideology of Pan-Africanism was a controversial issue of public importance and whether WNJU–TV was unreasonable in determining that no controversial issue of public importance was discussed during the Black New Ark program of December 29, 1973. WNJU–TV stated that the festival was the only topic discussed and views were expressed that the festival served as a unifying force for African people around the world; that the festival was only for Blacks; and that it was an alternative to the celebration of Christmas, which had become very commercial.

In support of your view that the ideology of Pan-Africanism was a controversial issue of public importance, you submitted portions of

three articles from a monthly publication entitled *Black New Ark* in which Mr. Baraka discussed his belief that all blacks must unify and achieve "national liberation", i.e., "the regaining of the historical personality of a people", and that in order to do so, it must be done apart from any other "ideology", viz., Socialism, Left, Right, Trotskyism, Communism, etc., since each ideology primarily serves its own aims thus making the goals of the "national liberation" effort secondary. Your allegation that Pan-Africanism is a controversial issue of public importance also apparently is based on your claim that "extremists" are attempting to unify all Blacks internationally. You stated that, according to the FBI 1973 Annual Report, "A new and fast-growing contributing source to the climate of violence in the United States has been increased efforts by black extremists to exploit the ideology of Pan-Africanism by internationalizing black extremism for the avowed purpose of violently overthrowing the United States Government and Capitalism."

In your letter of December 29, 1973 to the station you stated:

> The controversial issue of public importance which they discussed was the ideology of Pan-Africanism. Their viewpoint was for the ideology and against American ideology. They discussed Kwanza (phonetic), the Pan-African festival of the harvest. They discussed the 7-Principles of Baraka's revolutionary value system. The purpose of this value system is "gaining, maintaining and using power" for African people. African people throughout the world are one nation. They then viciously attacked the celebration of Christmas. Baraka referred to it as "X-mas". He said that it only means money and "conspicious consumption". African people must work for "national liberation".

Your bare statements that "the 7-Principles of Baraka's revolutionary value system were discussed" and that the "purpose of this value system was 'gaining, maintaining and using power' for African people" do not demonstrate that a controversial issue of public importance was discussed. Moreover, even if the festival of Kwanza may be related to the "ideology of Pan-Africanism," you have not shown how the discussion of the festival presented viewpoints on Pan-Africanism or how such viewpoints presented one side of a controversial issue of public importance. Therefore, it cannot be concluded, from the information before the Commission, that WNJU–TV was unreasonable in its determination that no controversial issue of public importance was discussed.

Accordingly, based on the foregoing, no Commission action appears warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
*Chief, Complaints and Compliance Division*
*for Chief, Broadcast Bureau.*

FCC 74-440

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF KMIN, INC., RADIO STATION KMIN, GRANTS, N. MEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 25, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has under consideration the petition of KMIN, Inc., licensee of Radio Station KMIN, Grants, New Mexico, filed on December 3, 1973, for reconsideration of the Commission's Memorandum Opinion and Order adopted October 25, 1973 (43 FCC 2d 566) which denied licensee's application for mitigation or remission of a forfeiture of two thousand dollars ($2,000) assessed against the licensee by Memorandum Opinion and Order adopted by the Commission on April 4, 1973 (40 FCC 2d 434).

2. The forfeiture in this proceeding was imposed for repeated unauthorized operation during presunrise hours, in violation of Section 73.87 of the Commission's Rules, and for failure to observe the terms of the station license.

3. The petition for reconsideration presents no new arguments or basis for reduction of the forfeiture not heretofore considered by the Commission in connection with prior pleadings filed in this proceeding.

4. Accordingly, the petition for reconsideration filed December 3, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*



104-037—74——3

FCC 74-470

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>AN INQUIRY RELATIVE TO THE FUTURE USE OF THE FREQUENCY BAND 806–960 MHz; AND AMENDMENT OF PARTS 2, 18, 21, 73, 74, 89, 91, AND 93 OF THE RULES RELATIVE TO OPERATIONS IN THE LAND MOBILE SERVICE BETWEEN 806 AND 960 MHz | Docket No. 18262 |

SECOND REPORT AND ORDER

(Adopted May 1, 1974; Released May 2, 1974)

BY THE COMMISSION: COMMISSIONERS REID AND HOOKS CONCURRING IN THE RESULT; COMMISSIONER QUELLO NOT PARTICIPATING.

1. The rulemaking proceeding deals with the allocation of frequency spectrum in the 806–947 MHz band to the land mobile radio service and to the development of regulations pertaining to the future use of that spectrum. The first phase of the proceeding, initiated on July 17, 1968, with a Notice of Proposed Rule Making and Notice of Inquiry (33 FR 10807) and consummated on May 20, 1970, with a First Report and Order and Second Notice of Inquiry (35 FR 8644), accomplished a general reallocation of spectrum in the 806–947 MHz band with the effect of providing an additional 115 MHz of spectrum to the land mobile radio service. It also provided a tentative sub-allocation of this spectrum within the land mobile service, with 75 MHz being allocated for the development of high capacity common carrier mobile communications systems to be operated by wireline common carriers and 40 MHz for the development of efficient private and shared systems for use by eligibles in the Industrial, Land Transportation and Public Safety Radio Services (Parts 89, 91 and 93 of the Rules). The second and current phase of this proceeding was initiated with the Second Notice of Inquiry, released coincident with the First Report and Order, and deals in greater detail with the questions of spectrum allocations within the land mobile service and the development of systems standards and other regulations applicable to the new 900 MHz land mobile bands.

2. In the Second Notice of Inquiry, the Commission requested interested parties to undertake detailed technical and marketing studies looking toward the future use of the 900 MHz band to meet the public need for land mobile radio services to and beyond the year 1980. Special emphasis was placed on the need for greater spectrum efficiency in designing new systems for this band. In December of 1971, a number of parties submitted written reports describing the results of their developmental efforts. Supplemental filings and comments on the initial

reports were received in July of 1972. Many of the technical reports and comments contained new data or raised policy questions which had not been previously addressed in this proceeding. Therefore, to allow interested parties an opportunity to present their views on these matters, the Commission received oral presentations on May 14 and 15, 1973.

3. During the course of the second phase of this proceeding some 58 parties filed written statements and/or were represented in oral arguments to the Commission. The names of these parties are listed in Appendix A. Numerous comments and letters have also been received from members of the public and Congress and have been taken into consideration. All of the information submitted to the Commission has been thoroughly analyzed and care taken to ensure that all positions and arguments are fully understood. We have now reached the point in this proceeding where we believe it appropriate to decide the major policy questions, to finalize the basic frequency allocation and to adopt specific regulations governing the licensing of 900 MHz land mobile systems. For convenience and clarity we have arranged our discussion of these matters in three sections. The first section deals with frequency allocation and related matters; the remaining sections deal with policies and regulations pertaining to the various systems to be accommodated in the 900 MHz band. Rules being adopted at this time are contained in Appendix B.

4. The main areas of controversy throughout the current phase of this proceeding have centered on questions of spectrum allocations and Commission policies toward the regulation of the various land mobile systems which have been proposed for operation in the 900 MHz band. Before discussing our conclusions regarding those matters, we believe it will be useful to briefly define the land mobile systems which are being considered for this band.

5. The cellular system, as proposed by AT&T and others in this proceeding, is a sophisticated, high capacity land mobile system requiring a large capital investment and a substantial spectrum allocation. The spectrum assigned to such a system would be divided into discrete channels which are assigned in groups to small geographical cells covering a defined service area. The key to the cellular system's high capacity is its ability to shrink the size of those cells while holding the total amount of spectrum used by the system constant. What results is a multiple re-use of channels throughout a given geographical area and more traffic intensity per unit of spectrum in advanced stages of development than other land mobile communications system proposed to date. This is achieved, however, with considerable expense and technical complexity. Fortunately, the expense can be shared over a much larger user base than with other systems. To date, two companies, Bell Laboratories and Motorola, have submitted detailed cellular system proposals to the Commission. Although the basic systems concepts are identical, there are some technical differences which affect the amount of spectrum each system would need to operate efficiently. The primary technical difference lies in the bandwidth of the discrete channels. The AT&T proposal calls for channel widths which are 60% wider than those proposed by Motorola. On the surface it might appear that 60% more spectrum would then be needed for the AT&T proposal over

that of Motorola. However, complicating the argument over bandwidth is the ability to re-use channels at close geographical spacing. According to AT&T, the wider bandwidth allows for more intensive channel re-use, which outweighs any initial spectrum saving due to the narrower channels. There is also a difference in the type of service to be provided on the two proposed systems. The AT&T system would be utilized for fleet dispatch as well as mobile telephone service, whereas Motorola's system is designed for mobile telephone service only. This difference has a significant impact on the amount of spectrum each would need. AT&T's dual purpose system calls for 64 MHz while the initially proposed Motorola telephone-only system would need 19 MHz.

6. The second class of system under consideration is the multichannel trunked system. This system is similar in concept to so-called community repeaters widely employed in the private dispatch service today except that the users would have access to a number of channels instead of just one. Actual channel access is controlled by a central computer, which gives a user the first available channel or places the user in a waiting line (queue) to be served in turn. This technique provides the user a higher grade of service than is possible in comparably loaded non-trunked systems by reducing the amount of time he must wait for a channel and/or reducing the probability that his call will be blocked. Small scale trunked land mobile systems are presently being used to a limited degree by common carriers providing mobile telephone services in the 450 MHz band. The innovation lies in its intended application to vehicular fleet dispatching and the potential of using many more channels per system than is now possible. As proposed by both General Electric and Motorola, trunked dispatch systems would be suitable either for large single users, cooperative groups of users on a cost shared basis, or commercial operators providing service for hire. The nature of trunked systems makes them particularly suitable for serving different types of users on the same group of channels without interference. With today's single-channel systems it is generally desirable to put similar types of users on the same channels in order to control interference. That approach, however, requires separate allocations of channels for the various classes of users which often leads to spectrum inefficiencies. In the trunked system, different types of users can be intermixed more readily as they operate essentially independently of each other, the computer assigning channels on demand. Once a user is assigned a channel, it is his exclusively for the duration of his call and no one else on the system can listen or interrupt during normal operation.

7. The final category of system proposed for the 900 MHz band is the basic conventional land mobile system in use today in the lower frequency bands. While these systems may also employ one or more channels, their distinguishing feature is manually controlled channel access as opposed to the computer control used in trunked systems. This makes the conventional system simpler and cheaper, but causes some loss of traffic efficiency resulting in either fewer mobiles per channel or lower service quality. The degree of such inefficiency depends largely upon the traffic characteristics of the users. Our analysis would indicate that for a significant segment of the land mobile requirement, particu-

larly where short range, short message communications are involved, the conventional system can be as or more efficient than the trunked system. Therefore, considering its lower cost and greater operational simplicity, the conventional system, we feel, has a definite place in the 900 MHz band alongside the more sophisticated systems described above.

*Discussion of Allocations*

8. In the past, the Commission has treated land mobile spectrum requirements from a service perspective, allocating blocks of spectrum, usually on a nation-wide basis, to each of the twenty or so radio service categories. This method of allocation has led to parochialism among the users and inequitable situations where spectrum shortage and abundance exist side by side in the same cities. In this docket, we are proceeding to meet land mobile spectrum requirements in a somewhat different manner. Rather than allocating according to user categories or services, we have chosen to allocate by system type and to allow the market to determine ultimately how much spectrum is utilized by the various types of users. With this in mind, the allocation problem becomes a matter of defining the systems to be accommodated, determining how much spectrum will be needed to satisfy the demand for such systems over a reasonable period of time, and arranging the separate allocations in an orderly plan, taking into account the technical characteristics of the systems and their electrical compatibility with each other and with systems in neighboring bands.

9. The concept of allocating spectrum for systems rather than services has been accepted or encouraged by many who have participated in this docket. To be sure, some of today's service groups have asked for their own private allocations of radio spectrum, but the weight of arguments in the proceeding recognizes the drawbacks of such allocations and supports specific allocation proposals along the lines of systems or broad types of service, e.g., dispatch or mobile telephone. A half dozen different allocation plans were proposed in the various filings in this proceeding, each of which has been carefully considered in developing our own plan.

10. Throughout this docket the Commission, industry, and the public have been dealing with innumerable unknowns, ranging from radio propagation phenomena and new system technologies to innovative service offerings and future market projections for these services. While we now believe that we have a better grasp of these factors through our analysis of the information submitted to the Commission and discussions with industry and user groups, there are still a number of technical questions which only further developmental work can answer, and the ultimate demand for the proposed systems can only be determined in the market itself. For these reasons it is important that any allocation plan be flexible enough to cope with new and often unforeseen technological and economic forces. We feel the allocation plan which we are advancing provides us with that flexibility while amply satisfying presently defined needs.

*I. Frequency Allocations to Cellular Land Mobile Communications Systems*

11. Originally in this docket the Commission tentatively allocated 75 MHz for the use of wireline common carriers to develop cellular land mobile and air/ground systems. The size of this allocation was generally supported by the wireline industry and by a number of radio equipment manufacturers. However, it was opposed as being excessive by the radio common carriers, most radio equipment manufacturers, independent equipment sales outlets, private user organizations, and a large number of private users themselves. The Department of Justice and Office of Telecommunications Policy also deemed this allocation to be excessive.

12. At the time the allocation was made, in 1970, there was very little evidence to indicate if 75 MHz of spectrum was too much or too little for the intended purpose. Little was known about cellular technology and even less about the potential market for such a system. Based on our current understanding of these factors, we have concluded that the 64 MHz which AT&T proposed for a domestic public cellular land mobile system is somewhat excessive.[1] According to most market projections, 64 MHz of spectrum would handle the foreseeable demand for mobile telephone and a substantial portion of the dispatch market to the end of this century in our biggest cities. In the medium to small urban areas, those of two million and under, such an allocation would give the operator enough capacity to handle the total land mobile demand, dispatch and telephone, far beyond the time frame contemplated in this proceeding. Consequently, we are reducing the size of the allocation for cellular systems to 40 MHz. In addition, we will not assign the full 40 MHz to any single operator all at once. Rather, in each area the system operator will be given the minimum amount of spectrum required for that area initially. Additional spectrum will be made available upon a showing of need. This plan is similar to AT&T's as outlined for Philadelphia in its December 1970 technical filing. In AT&T's plan a start-up system could be established by utilizing only 12.5 MHz. As the system grew it would utilize additional spectrum until the allocation was exhausted. After that, further expansion would require cell division. Our plan, therefore, differs from AT&T's in the size of the total allocation and in the fact that the Commission will retain control over the unused portion of the allocation until actually needed in each system. We note that our approach is similar in effect to the recommendation of the Office of Telecommunications Policy which called for an initial allocation of 14 MHz for cellular systems with additional reserve to be allocated as required.

13. A 40 MHz cellular system utilizing 40 KHz channeling should have an ultimate capacity to handle about 105,000 telephone subscribers and 105,000 dispatch users (see AT&T December 1970 filing, page 40). This is sufficient capacity to handle the predicted market for mobile telephone to the year 1990 in the largest cities, plus one quarter or more of the dispatch market in those areas. There is, however, considerable uncertainty involved in predicting the mobile telephone mar-

[1] AT&T proposed to use the remaining 11 MHz for public air-ground service.

ket. This uncertainty results primarily from the possibility of the service developing into a consumer item. For this reason we have also strategically placed spectrum reserves totalling 20 MHz in proximity to the cellular allocation which could be used in the event of unexpected growth. We must stress, however, that the marketing studies submitted to the Commission do not indicate that such would be the case, at least in the foreseeable future. Moreover, should a consumer market develop, it would most probably require spectrum in excess of the total available in the 900 MHz range. Therefore, we cannot realistically plan for that kind of growth in this proceeding but would have to look to other regions of the spectrum to obtain the necessary capacity.

14. AT&T has argued that an allocation of less than 64 MHz for a cellular system would result in an increase in the cost of the service. The Commission has studied this point carefully, but we do not feel that the cost penalty of reduction from 64 to 40 MHz would be significant. Using AT&T's own data, the proposed reduction in available spectrum for the cellular system will raise the shared facility cost per mobile unit by about 20%. In as much as the shared facilities' cost represents only about one-half to one-third of the total cost to the user, the 20% cost penalty is reduced to less than 10% in his overall bill. Moreover, the capacity and ultimate cost of mobile telephone service in a cellular system is highly dependent on technology. For instance, a reduction in channel spacing, which some have argued is feasible, could increase the total system capacity and affect ultimate costs. The application of mass production techniques and competition in the production of mobile units for the cellular system could drive prices down below that which is presently foreseen. Despite these uncertainties over the future market for mobile telephone service, we believe the 40 MHz proposed for a cellular system is sufficient and will provide for adequate growth and reasonable costs over the foreseeable future.

*II. Frequency Allocations to Air/Ground Communications Systems*

15. At this time we are making no allocation for a public air/ground system. AT&T had proposed that 11 MHz be used for such a system although it made no factual showing in this docket to substantiate any appreciable public demand for the service which cannot be met through the use of channels presently allocated for that purpose. Furthermore, ARINC, in its July 1972 comments, noted the Air Traffic Conference of 1963 adopted a resolution which, in effect, prevents the use of public air/ground systems in scheduled service. Therefore, the spectrum which might have been allocated for air/ground service is being incorporated into the several reserve bands mentioned earlier. Should it be warranted, a separate proceeding may be instituted in the future to consider the overall question of public air/ground communications spectrum requirements. Also, the proposals of ARINC for additional spectrum for general aviation use in this band are being denied on the grounds that such proposals were considered on their merits and denied in the First Report and Order herein (paragraphs 21 through 23). No new information has been submitted by ARINC which would alter that decision. Furthermore, this band is not well suited for aeronautical services which generally require a high degree of international standardization. The use of these frequencies for mobile services in the

United States will be in derogation of ITU Region II allocations and coordination of aeronautical service with neighboring countries would be difficult, if not impossible.

*III. Frequency Allocations to Conventional and Trunked Land Mobile Communications Systems*

16. The next allocation which we will discuss is for conventional and trunked systems. For the most part, we expect those systems to be used for fleet dispatch operations of the kind now accommodated under the so-called private land mobile services. In the 1970 Report and Order, the Commission tentatively allocated 40 MHz of the 900 MHz spectrum for private land mobile services. The size of this allocation has not been seriously disputed in this proceeding, although some parties, notably equipment manufacturers and user groups, urged that the private allocation be larger. These same parties later supported the OTP recommendation of 40 MHz to be allocated for "any mobile service to be offered on a non-rate regulated competitive basis".

17. At this time we are making available an allocation of 30 MHz of spectrum for conventional and trunked systems with additional reserve bands so placed as to be readily accessible for future growth if needed. Based on market projections given by industry, 30 MHz should be sufficient in most areas well into the 1980's, and the reserve bands will take care of any unforeseen growth within and beyond that time frame. As will be discussed further in a later section, it is our intent that the allocation for conventional and trunked systems be available for both private and commercial (third party) operation and used for either mobile telephone or fleet dispatch service. These provisions are discussed in more detail in the section below dealing with the regulation of these systems.

*IV. Frequency Provisions for Industrial Scientific and Medical (ISM) Devices*

18. Throughout this proceeding the General Electric Company has urged us to reconsider our plan to reduce the size of the ISM (industrial, scientific and medical) spectrum provision from 50 MHz to 26 MHz. General Electric claims that such a reduction will make it impossible to continue manufacturing economical microwave ovens for this band. It argues that a minimum of 38 MHz is needed to make an oven which is competitively priced and capable of cooking all types of foods properly. Although there appears to be some merit to GE's arguments, we are not inclined to give up our ultimate goal of reducing the ISM emission limits to 26 MHz. To reopen all or a large part of the original ISM provision would cause a serious reduction in the amount of spectrum available for land mobile communications services in this range. On the other hand, it is likely to be 10 to 15 years before the full land mobile allocation will be required and thus some interim provision can be made for continued use of wide-band ISM ovens during this period. This should provide necessary time for the production of ovens capable of utilizing the narrower emission, without crippling the industry by forcing it into tighter standards which are not now feasible. Our decision, therefore, is to establish a guard band 12 MHz wide immediately above the regular ISM provisions so that the total spectrum available for microwave ovens would be 38 MHz. However, this guard band

would carry a time limitation of 5 years, after which the band would revert exclusively to land mobile use. This will provide an opportunity for the oven industry to continue development of more spectrally efficient devices which can meet the narrower bandwidth. In the meantime, the temporary 12 MHz ISM guard band could be considered for sharing by land mobile or related services which can tolerate oven interference and which do not require a paired allocation.

*V. Land Mobile Reserve Allocations*

19. Most parties who filed allocation proposals in this docket recommended the establishment of reserve bands to accommodate new land mobile services or unexpected growth in existing services. We feel that this concept is an excellent one and a generous amount of reserve spectrum has been incorporated into our allocation plan. Our plan calls for 8 reserve bands with a total of 45 MHz. The bands are so positioned as to allow the greatest flexibility in expanding the proposed services and for accommodating new services. The reserve bands also provide buffers between high and low power land mobile stations and provide some degree of flexibility in coping with special problems along the Canadian and Mexican borders. These reserve bands are not being allocated to any specific use at this time, but are merely designated as land mobile reserve. Their allocation in the future will be the subject of separate rule making as the need arises.

*VI. Treaty Considerations*

20. Under present international treaty obligations land mobile operations in the 900 MHz band will be in derogation of the ITU allocation table for Region II. Such derogations are permitted under No. 115 of the International Radio Regulations, provided we afford protection to assignments operating in accordance with the ITU allocation table and accept any interference from such operations. The obligation to protect both Canadian and Mexican television assignments between 806 and 890 MHz will mean that the assignment of some types of land mobile operations, primarily high powered and/or omnidirectional stations, will be impaired close to the border areas. This is especially true in Detroit and Buffalo, where even low powered mobile units might cause interference in certain nearby Canadian UHF–TV coverage areas. In exceptional cases such as these, the national allocation table we have outlined might be modified to provide land mobile spectrum relief in the reserve sections above 890 MHz. The need for such adjustment would be the subject of future rule making if necessary. In order to meet international commitments, we intend to examine all applications for land mobile stations within possible interference range of each border to ensure that harmful interference to Canadian or Mexican assignments will not result. This procedure will apply to land mobile operations within the entire band 806 to 947 MHz. More specific coordination procedures may be adopted at a later date as a result of our continuing discussions with the respective administrations.

*Policies Relating to Cellular Communications Systems*

*I. Ownership of Cellular Systems*

21. The parties filing comments have generally not questioned allowing wireline carriers to operate cellular systems. There has been a general feeling of malaise about letting wireline monopolies expand in the mobile communications market which has been traditionally served primarily by competitive entities. However, the wireline carriers are the only organizations which have demonstrated that they possess the resources and the expertise necessary to establish cellular systems which would have nationwide compatibility. AT&T was the only entity which submitted a comprehensive proposal for developing and implementing compatible cellular systems. Therefore, we have concluded that wireline carriers should be permitted to operate cellular systems. Moreover, since a cellular system is technically complex, expensive, and requires a large amount of spectrum to make it economically viable, competing cellular systems would not be feasible in the same area. Also, as these systems will require extensive interconnection with the wireline telephone system, and nation-wide compatibility is desirable, we have concluded that only wireline carriers should be licensed to operate them.

*II. Restrictions on Wireline Telephone Companies*

22. A major concern voiced to the Commission by various parties to this proceeding deals with potential anti-competitive action on the part of wireline telephone companies through the use of cross-subsidies. It is feared that the guaranteed revenues generated by the telephone companies in their wireline operations will be used to give them an advantage in the sale of mobile dispatch services on the cellular system.

23. The Commission is fully aware of the danger of unchecked cross-subsidization in a competitive communication market and we fully intend to take appropriate steps to ensure that this practice does not take place. Therefore, as a minimum we shall require that any wireline telephone company establish a wholly separate operating company with separate books of account, separate officers and separate personnel in order to operate a cellular land mobile system as well as any other separation requirements we may deem necessary to prevent cross-subsidization. We shall establish detailed regulations and procedures for the separation of subsidiary and parent organizations at a later date.

24. While we think that establishment of separate operating companies with separate books of account, separate officers and separate operating personnel will go far to prevent the cross-subsidization feared by many parties, we will also impose certain other restrictions on the wireline companies. They, for the most part, have already been accepted by the Bell System and the independent telephone companies. Thus, the wireline companies will not be permitted, directly or indirectly, to manufacture, provide or maintain mobile equipment. In addition, the base station components must be manufactured by companies wholly independent of the wireline carriers.[2]

[2] Wireline carriers will be allowed to manufacture and maintain radio equipment for use in initial developmental cellular systems. However, this equipment may not be used when the system becomes operational or in developmental systems offering service to the public.

All contracts between any telephone company and its mobile telephone affiliate or subsidiary shall be filed with the Commission and records of all money flows and exchanges or flows of property (of whatever kind) between them shall be maintained and reported periodically in accordance with rules specified by the Commission. Moreover, any telephone company will be required to offer interconnection services to the public on the same basis as it does to its mobile telephone affiliate or subsidiary. We should like to think that these measures are sufficient to provide regulatory control of the cross-subsidization problem.

25. A number of the parties filing comments expressed a concern that permitting the wireline carriers to offer dispatch services through their cellular systems could, because of their ability to cross-subsidize, result in anti-competitive practices and eventual market dominance by the wireline companies. On the other hand, dispatch or dispatch related service makes up a substantial part of the initial market for cellular systems proposed by the wireline carriers. To exclude dispatch-type services entirely could delay or even prevent the implementation of any cellular systems. Also, if cellular systems can, through natural economies, provide lower-priced dispatch services, the public should not be denied that benefit. We have therefore concluded that the operators of cellular systems should be allowed to provide some dispatch services. With regard to the cross-subsidization issue, we feel that the restrictive measures described above will greatly minimize the ability of wireline carriers to cross-subsidize. However, we think it desirable to place some restriction on "fleet type" automatic dispatch offerings by operators whereby a dispatcher can call several vehicles simultaneously. In this regard, there is technical evidence that the widespread use of "fleet call" in a cellular system would substantially reduce its efficiency, thus eliminating an important reason for having a cellular system at all. Therefore, we will not allow cellular systems to offer dispatcher-originated communications service with "fleet call" capability whereby a single dispatcher can automatically call several vehicles simultaneously.

*III. Developmental Authorization of Cellular Systems*

26. Initially, we will authorize only developmental systems until we are reasonably sure that all factors necessary for regular implementation are accomplished. Developmental systems will be authorized on a one-to-a-market basis and only one system per telephone company. For system planning purposes the entire 40 MHz of spectrum may be considered as being available although the Commission may limit initial assignments of spectrum to less than 40 MHz. Therefore, any proposal for an initial developmental authorization must include a request for the minimum amount of spectrum required for the area proposed to be served. Additional spectrum, beyond that specified in initial developmental authorizations, will be made available upon a demonstrated showing of need and in accordance with criteria to be set forth in a subsequent rule making proceeding to amend Part 21 of the Rules to provide for the regular licensing of cellular systems. That proceeding will also provide technical standards, loading criteria, etc. It will be instituted when more detailed technical information becomes available through the developmental systems.

27. The guidelines under which developmental cellular systems will be authorized are contained in Appendix C.

### *The Assignment Plan for Private, Shared, and Common User Communication Systems in the 900–MHz Band*

*Preliminary Comments*

28. In the past we have made separate allocations and provided different regulatory schemes for private systems of communication and for radio facilities used to provide service to the public. The former were authorized in the Safety and Special Radio Services and the latter in the Common Carrier Services. Nevertheless, over the years, especially during the course of the decade just passed, hybrid arrangements for radio communication facilities have evolved in the private services, particularly under our cooperative use and multiple licensing practices.

29. We have examined what we plan to do, here, in the light of the history of the foregoing regulatory framework and of the development of the land mobile services, and we have decided to modify, considerably, the traditional scheme of regulation we have followed in the past. Thus, while we still believe, as we have made clear in prior portions of this Report and Order, that common carrier-type regulation is appropriate for the large cellular land mobile radio systems (which, because of their design, can most effectively be operated by a single entity), we have determined that such manner of administrative control is neither appropriate or desirable for the variegated systems of communication we plan to authorize in the 806–821 MHz and 851–866 MHz bands.

30. In this connection we would point out that while some systems of land mobile radio communication have been authorized as common carriers, the vast majority of those employing radio are licensed in the private services. These private systems serve vital needs and requirements of governmental, industrial, and land transportation entities, but, unlike facilities licensed in the Domestic Public Radio Services, they operate under restrictions and limitations as to the persons who may employ them; as to the purposes for which they may be used; and as to the kind of messages that may be transmitted. The scheme of regulation we adopt here parallels that used in the private services. Accordingly, while our action departs from the traditional approach to administrative control over public and private systems of radio communication, it does follow closely assignment policies and practices used in the private services. Thus, in major respects, our plan is not entirely new or untried; rather, it arises out of and amplifies and builds on what we have found to be an effective and efficient method of management of the radio spectrum.[3]

31. To explain, our new plan is designed to permit the establishment of a large variety of systems of radio communication to meet the many and varied requirements of different users. The assignment

[3] The Commission has long treated private and land mobile communication systems under a specialized regulatory scheme. Basically, we have expanded that plan, here, to cover a wider range of alternatives for establishing or obtaining communication services. In accomplishing this objective, we have abandoned, to a large degree, the service categories employed in the past, and we have also combined private, shared, and common user systems under a single assignment and regulatory plan which we believe to be more efficient than that used in the past.

plan is flexible. It will allow police eligibles (and other classes of users, as well) to establish their own radio facilities and to manage them in ways they think best meet their individual requirements. Also, they may share facilities with other classes of users on a cooperative basis; or form nonprofit corporations or associations to serve as licensee and to manage their systems for them. In this way they will be able to spread the costs over a broader base and reduce capital and operating expenses proportionally. Finally, under certain conditions, we would license a person to provide service, on a commercial basis, to a single customer, say a large, metropolitan police department. That is one possibility. Another would be to license a common user system to provide service to a number of small police forces, which may be operating in adjacent jurisdictions, under some arrangement which would afford all the means of communication they require at low cost and in an efficient manner. And, of course, many other variations of such arrangements will be possible. Our plan provides for this.

32. In addition, eligibles will have the choice of trunked or conventional systems. Further, within each of those modes of operation, they will have a variety of ways in which to use radio, and this will permit them to tailor, to a fine degree, the communication systems they elect to establish. Added to this, overlaying all of these alternatives, they will have an option to switch from one type of system to another, and then back again, should any prove to be unsatisfactory or not to work out as expected.

33. A plan of this kind is feasible, for we now have sufficient spectrum space to offer a large number of options to the land mobile community. Thus, in any one area, and in adjacent areas, too, we have the potential for 600 single-channel conventional systems; or 30, 20-channel, or 60, 10-channel, or 120, 5-channel trunked systems. There are other combinations, too. Therefore, overall, with the spectrum we are making available for immediate use and with what we are holding in reserve, we are assured, perhaps more so than ever before, that we will be able to accommodate the needs and requirements of land mobile operations, in a most effective and efficient manner (with little or no congestion), for many years to come.

34. We are fully aware (the parties have not failed to remind us of this) that some of the entities we propose to license, i.e., entrepreneur-operated, comon-user systems, could be licensed as common carriers and regulated under Title II of the Communications Act. However, our basic goal in this proceeding is, as it has been since its inception, to make available to the land mobile service additional spectrum and to do this in a way that would promote the larger and more effective use of this spectrum in the public interest, all in conformity with our duties, obligations, and responsibilities under Title III of the Act. Moreover, the type of radio operations planned, here, for the land mobile services at 900 MHz, were not envisioned by the original drafters of the Communications Act. In this instance, the radio services we are establishing fall somewhere between what Congress had in mind in framing the provisions of Title II and what it intended to cover under Title III of the Act. In these circumstances, then, we feel we have the discretion necessary to select the regulatory tools we believe will most effectively promote the public interest.

35. In accomplishing this goal, we are free, we believe, to adopt whatever comprehensive regulatory scheme is best suited for the purpose. In this instance, on the basis of the extensive record in this rule making, and also in light of our experience, particularly that over the past two decades, we find that our plan for the use of the 900 MHz spectrum would not be best implemented by restricting the number of licensees. We are of the view, rather, that reliance should be placed on the competitive forces present in the communications market to give land mobile users the options and choices we feel should be theirs. In this connection, then, we have concluded that we do have the necessary statutory authority to choose one regulatory process which is preferable, on demonstrable grounds, over another which is not at all suited to the objectives of the action we propose to take. This, we think, is the central holding in *United States* v. *Southwestern Cable Co., et al.*, 392 U.S. 157 (1968); and *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission*, 123 U.S. App. D.C. 298, 359 F. 2d 282 (1966).

36. In this connection, we have, of course, addressed ourselves to the argument advanced by a number of the parties that the Communications Act, together with certain precedents cited in support of the proposition, compel the conclusion that we do not have discretion in this matter to select one regulatory scheme over another; that we must treat any entity offering commercial service to eligibles or licensees in the private services or to the public as a common carrier and regulate that entity as a common carrier. But we do not think we are restricted or limited in this way in carrying out our duties and responsibilities under the Act of assuring the most effective and efficient use of the radio spectrum under whatever controlling circumstances exist. We believe, rather, that the Communications Act, read as a whole, directs us to regulate the use of the radio frequencies that are available in the way that affords maximum benefits to the public, and that is what we have done, here.[4]

37. In this connection, we would point out that we have allocated 30 MHz of spectrum space, or an equivalent of 600 25 kHz voice-grade channels, for the future development of mostly dispatch-type land mobile radio communications systems. Further, this is a new range of spectrum for land mobile use, much higher than that used in these services in the past. Thus, as we have mentioned, new system design; new equipment; and new marketing practices are to be worked out as the frequencies are placed in use. In these circumstances, we cannot predict with any degree of certainty what types of communication systems will emerge or what methods of marketing will make them most available to the land mobile communication users. However, our

[4] It is pointed out that such a licensing practice would be at variance with that presently used in authorizing service in the Domestic Public Radio Services, under Part 21 of our rules. This is so. But where we find it necessary, in achieving a desirable goal, to abandon a trail once followed, and to turn to a new one, we must have the right to do so. There must be progress, and we must be able to learn through experience what is good and what is not, and to act upon that experience. For this reason and others set out, above, in our opinion, we deny the "Motion for Severance of the Issue of Multiple-User Licensees from the Frequency Allocation Aspects of this Proceeding and for Resolution of that Issue in an Evidentiary Hearing," filed herein on October 19, 1973, by the National Association of Radiotelephone Systems (NARS). The issue NARS points to has been been debated at length. Parties, including NARS, have addressed themselves to it in their comments and pleadings and in oral argument, too, and we see no need for further proceedings to decide this legal question. Accordingly, as stated, the referenced motion is denied.

experience over the past 25 years teaches us that detailed subdivision of the spectrum, with attendant restrictions, does not always promote the fullest and most efficient utilization of radio frequencies. Accordingly, we have grouped varying classes of users and varying methods of use together and we have allocated for their use the entire band of 30 MHz. We did this specifically and intentionally, for we wanted the competitive forces in the market place and the relative needs of each user or group of users to decide what assignments are made first and to whom such assignments are made. In this way the three basic types of eligibles are placed on equal footing, i.e., private, shared, and common user systems have commensurate or corresponding opportunities to apply for and to establish systems of radio communication required to carry out authorized functions and activities. No person is excluded and no person can exclude, by recourse to challenges on economic or other grounds inconsistent with this plan, so there will be open entry to the market and competition among users, but all this on a fair basis as we have just described.

38. With this spectrum, with the combinations mentioned, we believe that the competitive forces of the market place can be relied upon to provide the foundation upon which we may properly rest our regulatory approach. To illustrate, as to the cost and quality of service, or as to the form it takes, there is no need for regulatory measures like those imposed on common carrier operations, for each user will be free to negotiate with multiple suppliers and communication companies for the facilities he needs. Also, in certain circumstances, he may apply for and construct his own system, should he find that mode of operation to his advantage. Or he may join with others to bring together the necessary elements of a radio system under our "cooperative use" practices; or form a nonprofit association or corporation for the purpose; or rely on a trade organization, which may offer communication services to its members on a nonprofit, cost-shared basis. All of these avenues are open to the user; and with them we feel he is protected from those abuses that might arise, were the circumstances other than what they are.

39. Additionally, we think it very important that we exercise our authority and adopt a regulatory plan which is greatly simplified. We want the burden on the applicant to be significantly less. We would like to cut down on the costs to the public, particularly in the case of those seeking to bring service to it through common user systems. Also, we find it imperative to adopt procedures which will enable us to authorize eligible persons to establish the radio stations applied for at a much earlier date than is possible under current processes that now apply to radio common carriers.[5] We believe this can be best accomplished by adopting our plan—a plan we have modeled and

[5] We would note that, over the years, where procedures have been followed that provided for consideration of economic impact on common carriers, we have witnessed what seems to us are interminable delays in the authorization of service, in some cases extending up to 4 or 5 years and at times longer. Many of these delays, in our view, had or have little or nothing to do with the ultimate merits of any given proposal; rather, they are primarily the result of efforts on the part of existing carriers to keep out competition. These efforts have been effective in delaying, if not limiting competition; and, in some cases, they have frustrated the actions of persons interested in establishing what might very well have been a valuable service to the public, all with few, if any, corresponding benefits in terms of the overall public interest, convenience, and necessity.

fashioned on our practices and procedures in the private services, where a higher level of administrative efficiency does obtain.

40. On that point, we think it clear that no one user will necessarily have to look to a single business entity for service. This is as it should be, at least in the context of the fundamental objectives we have set for ourselves in the formulation of our 900 MHz assignment plan. Those objectives, we will mention again, are to provide a maximum number of ways under which a maximum number of qualified persons may, at the earliest date possible, with the least administrative delay and under minimum procedural restraints, provide themselves with the means of radio communication they may require to enable them to conduct their affairs in an efficient and effective manner.

41. Furthermore, there are great advantages to the public in having at 900 MHz a multiplicity of sources for the kinds of equipment and related facilities needed to meet the requirements of land mobile users. Companies of this kind—providing such services and facilities—can and do function independently, competing with one another for business, all without any adverse impact on the public. This being so, our plan is premised in part on the nature of the requirements of land mobile users; and we think it clear that "limited competition" or "natural monopoly" approaches, where detailed and complex regulatory procedures are imposed, would be antithetical to the best interests of these users and to the public, too.

42. Further, we are convinced that we, for our part, must not carry forward to the 900 MHz band the burdens and delays inherent in present procedures, used in regulating common carriers, except, of course, with regard to cellular service to be provided by wire line telephone companies. It is our view that it is very much in the public interest to shed this heavy cloak and exchange it for one with far greater flexibility and far greater promise for maximizing the potential of utilization of the radio spectrum at 900 MHz.[6]

43. Finally, we emphasize that our new assignment plan and the scheme of regulation we have devised to implement it are designed to be carried out on a national basis. All of the 600 radio channels are made available nation-wide. The frequency assignment methodology and technical standards and our operational rules are to apply nation-wide, where each frequency assignment will control where the next may be made—this without regard to state boundaries or varying local jurisdictions. In these circumstances, the methods which potential users may employ to make use of radio frequency must also be compatible on a nation-wide basis. If they are not, we will not be able to achieve the goals we have set for ourselves—goals which we feel certain will bring to the public what we foresee to be means for efficient, effective, and low cost communications.

44. We recognize that some state and local authorities, in exercising jurisdiction over intrastate common carrier communications, may attempt to impose regulations and controls over some or all types of

[6] In this regard, our 900 MHz plan will require a minimum of time for adjustments to service parameters, because we have, in our technical and loading standards, built-in allowances to permit expansion of service as it is required, all without major study or evaluation on our part. That is one of the features of the new plan, i.e., it has been conceived in a way which will permit us to eliminate the costly, time consuming, case-by-case treatment of every change or variation in the method of operation or in the charges or types of service provided by the licensee.

common user systems which would be inconsistent with our allocation scheme for 900 MHz. In this regard we are particularly concerned about regulation which may take the form of limiting or excluding potential users or classes of users from utilizing this band.[7] Such action would be in direct conflict with our attempt in this proceeding to establish a nation-wide system of radio communications consistent with our obligation under Title III of the Communications Act. Both Sections 2(b) and 221(b) of the Act, which reserve to the states jurisdiction to regulate intrastate common carrier communications, begin with language that makes it clear that state action must yield to the sole jurisdiction and power of the Commission to provide for allocation of the radio spectrum and to issue radio licenses. We think both these sections make it clear that Congress did not intend that such regulatory powers the state may be given with respect to intrastate communications be used to inhibit or thwart the Commission in exercise of its obligations in establishing a uniform national plan for use of radio frequencies. We stated in *Telerent Leasing Corp.*, 45 FCC 2d 204, 220, 223: "State action must yield to the sole jurisdiction and powers of the Commission to license radio facilities in the public interest" and that "no state regulation can oust this Commission from its clear jurisdiction."[8] Moreover, the Supreme Court has held that federal exclusion of state law is inescapable where compliance with both federal and state regulation is impossible. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142–143 (1963). Accordingly, we assert Federal primacy in this area and declare that any state regulatory action that may be taken with regard to users or potential users of the 900 MHz band that is inconsistent with the rules and policy promulgated in this proceeding is unlawful. While we are reluctant to take such preemptive action, we believe it imperative to the success of this program.

### *Licensing 900-MHz Stations*

#### *Eligibility*

45. Under our assignment plan, there will be three basic license classifications. Facilities will be authorized either as private, or shared, or common user stations. Under the first heading, private systems, we will license any person or entity eligible in any of the radio services included under Parts 89, 91, and 93 of the rules.

46. In the second license classification, we include, as eligibles, any person or entity offering to provide communication services and facilities, on a not-for-profit, cost-shared basis, to persons eligible under either Part 89, 91, or 93 of the rules. Thus, the licensee may be an individual licensee; a non-profit corporation or association, formed for the purpose of providing radio facilities to qualified participants; or it may be an entity such as a medical society or industry organization which has as its primary purpose some function other than the provision of communication services for their members.

[7] In addition to generally frustrating the objectives of this proceeding, any state restriction limiting the number of users would have a negative impact on frequency allocation. Rather than attempting to determine by administrative process the best use of the radio spectrum, our new plan at 900 MHz harnesses the competitive forces of the market place as a regulatory tool to insure efficient and effective frequency use. If those that are first licensed do not effectively utilize frequencies or provide for public need, opportunity will encourage others to seek radio facilities which, under free competition (and the rules we have designed), will supplant the less effective radio users.

[8] Under appeal, U.S. Court of Appeals for the Fourth Circuit.

47. Under the third and last license category, we have grouped commercial common user systems. These include any commercial concern offering to provide service to persons eligible under either Part 89 91, or 93 of the rules, on the one hand, and on the other, to the public in general, without regard to the eligibility factor. As we will point out, later, arrangements of the first type will be regulated differently from those of the other type; but in neither case will the licensee be subject to regulation as a common carrier.

48. Reviewing, then, there are to be three license categories, that is, one for private systems; another for shared systems; and the third for commercial common user facilities. Private systems, we envisage, will not be unlike those authorized under our present rules. Shared systems are to be operated on a not-for-profit, cost-shared basis, and they are to be available only to persons eligible in the private services. But the third license category is a new one, for under it commercial concerns will be able to provide communication services for profit, either to eligibles under Parts 89, 91, and 93, or, alternatively, to the public, in general.[9]

*Policy on Interconnection*

49. Our new rules also place restrictions on interconnection. In this regard, our policy will be to permit full interconnection only in those cases in which the licensee provides radiotelephone services, on a commercial basis, to the public. Thus, where the licensee serves himself (a private system), or where he provides service to eligibles on a not-for-profit, cost-shared basis (a shared system), or where service is offered to a restricted class of eligible users, but on a commercial basis (one of the two forms of common user systems), interconnection with the wire line facilities of the telephone company serving the area will be limited to those situations in which it is accomplished manually, by a person in the employ of the licensee or user, at the licensee's or user's principal place of business. Interconnection at a control point common to more than one licensee or user will not be allowed.[10]

50. Our policy on interconnection is being adopted because our continuing experience with it, in the private services, has convinced us that the mode of operation is basically incompatible with dispatch-type requirements. Thus, where interconnection is used, message time invariably increases, and, further, it brings into play a number of factors which decreases system efficiency. These factors include dial-up time requirements; use of "hold" features of telephone facilities; and a tendency not to monitor the channel before transmission, even in those cases in which the equipment employed is designed to permit it. Accordingly, while we know that interconnection is desirable in certain situations and necessary in others, we make limited provision for it, as previously explained.

[9] While, as we have indicated, we will not treat these commercial ventures as common carriers, this does not mean that they will not be regulated. They will be, but in a way which will promote, in our view, the fuller and more effective use of the new spectrum in the public interest.

[10] This practice is now being followed in connection with shared community repeaters authorized in the Business Radio Service in the 450–470 MHz band. It has worked well, and we have received no complaints from licensees that the restriction interferes in any meaningful way with their traditional dispatch-type operations.

*Other Restrictions on Operation and Use of 900-MHz Systems*

51. We have said that we plan to license 900-MHz stations under three basic categories, namely, as private systems, where licensees use their stations in carrying out authorized activities and functions; next, as shared systems, where service and facilities are provided to eligible persons on a not-for-profit, cost-shared basis; or, finally, as common user systems, where commercial firms offer facilities and services either to eligibles in the private services or to the public.

52. Now, in every instance in which service is to be provided solely to eligibles in the private services (in three of the four use categories just mentioned), there are to be three additional license restrictions. First, radio facilities so authorized may only be used for purposes expressly allowed in the radio services included under Parts 89, 91, and 93 of the rules. Second, each licensee or user must be shown to be eligible for facilities, either under this subpart or in the radio services, listed, above. Third, all messages and transmissions must be limited to those permitted in the services in which the participants are eligible.

53. These license restrictions are in contrast to those governing stations employed to provide radiotelephone services to the public. In the latter system, interconnection is to be allowed. There are to be no restrictions on the class of persons served, and messages of all types may be transmitted. In brief, common user systems of this type are to have the maximum degree of flexibility in the way, and by whom, they are employed; whereas, private, shared and common user facilities, used to serve specific classes of eligibles, are to be restricted and designed in a way that will permit qualified persons to conduct certain activities and functions in an efficient manner.[11]

*Filing and Processing of Applications for 900 MHz Facilities*

54. Applications for stations are to be submitted to the Commission at its offices in Washington, D.C.[12] All applicants are to use FCC Form 400, along with the additional information which must be submitted in connection with 900-MHz facilities.[13]

55. Our plan is to process these applications essentially in the order in which they are received. Once received, the proposal will be reviewed to determine whether it is acceptable for filing, i.e., not deficient in any

[11] This point may be illustrated by the use made of radio systems by public utilities, eligibles in the Power and Petroleum Radio Services. There, radio is used as a "tool," so that these enterprises may provide utility service on a more effective and efficient basis. And in the Fire and Police Radio Services, where, again, radio is used as a "tool," not in the conduct of the personal affairs of policemen and firemen, but to allow officials to carry out their governmental functions in a more effective and efficient manner. That is the essence of the private services, and we preserve it in the 900-MHz licensing processes through the limitations and restrictions placed on systems operated for, or by, groups eligible in these services.

[12] Applicants proposing operation within the Chicago Spectrum Management Region as defined in the First R&O Docket No. 19150, adopted Oct. 28, 1971, 36 FR 2167 shall file their application on Form 425 with the Chicago Regional Office. A subsequent order will be issued delegating authority to the Chicago Regional Office for the processing of such applications. Rules adopted herein will apply in the Chicago Region pending possible future rule making dealing specifically with 900 MHz land mobile operation in that Region.

[13] While we have not established a schedule of fees for filing or grant of applications for 900 MHz facilities, we plan to do so following the issuance of our report and order in this proceeding. Meanwhile, we will accept applications for filing, subject, however, to the payment of the required fees at such time as they are established.

material respect. If it is acceptable, it will be assigned a "priority", based primarily on the date and time it was filed. It will then be placed on our "processing line" for consideration "in turn". Where possible, the application will be granted. Should this not be possible, the proposal will be dismissed or denied, depending on the circumstances, and returned to the applicant, and, in this event, he will lose his assigned "priority".

56. These procedures will be followed until all of the channels available in the area are assigned. At that time, all applications on file, proposing operation in the area in question, will be placed in "pending status", if the applicant has made this election. Following this, each application in "pending status" will be considered "in turn" at such time as additional frequencies become available.[14] Where the applicant has not made this election (that his proposal be retained in "pending status"), it will be returned to him. He may, then, either file it at a later date or submit it, in modified form, for consideration for grant in some other area or region.[15]

57. We should emphasize, here, that applications for stations in the 900-MHz band will be processed and considered within the framework of specific standards, those set out in our rules. If the proposal meets these specifications, it will be granted. If it does not, it will either be dismissed, or denied, or kept in pending status, whichever action the facts of the case demand. In general, then, there are to be no hearings on comparative or economic issues, as such; and petitions to deny, in general, will not be entertained nor will other procedural or administrative remedies be available, except where the law so prescribes.[16]

58. These practices have been worked out, with care, to enable us to attain our primary objectives, i.e., to provide the maximum number of channels for communication to the maximum number of qualified users at the earliest possible date, all with a minimum of regulatory "red tape", but with options as to how, and from whom, service may be obtained.

59. Achievement of these goals is possible, we think, for we have sufficient spectrum space, with additional channels in reserve, to permit the establishment of multiple facilities in any one area or region and to duplicate them in adjacent cities and communities. With this, and with the licensing alternatives provided for, there will be no need for comparative consideration of proposals. Besides, such hearings would preclude implementation of our scheme of regulation, since it rests, in an essential way, on there being free and open competition in each area between persons offering equipment and services.[17]

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[14] We should add, "together with those submitted at a later date, seeking facilities in the same area." We do not intend to preclude the filing of applications even where the frequencies allocated for use in a given region have been exhausted.

[15] This may be an alternative course of action an applicant may wish to follow, because we will not permit anyone to file multiple applications for radio facilities where such proposals are situated so that if one application is granted, some other one, filed by the same applicant in an adjacent area, would have to be denied or dismissed.

[16] These procedures parallel those employed by us in licensing radio facilities in the private services. There, we have found they work well, enabling us to license facilities with the minimum delay, for the benefit not only of the licensee but, ultimately, for the public, as well.

[17] Our experience under the licensing procedures presently employed in the private services, where hearings have not been necessary, contrasted to the administrative delays occasioned by the processes applicable to common carrier regulation, confirms our views in this regard. We see no reason why the same benefits should not be translated to apply at 900 MHz.

*Selection and Assignment of Frequencies in the 900-MHz Band*

*Preliminary Considerations*

60. As pointed out, we have allocated 30 MHz for use in providing service to persons qualified to operate at 900-MHz. This has been done in two bands, with 15 MHz allocated in the 806–821 MHz band and 15 MHz in the 851–866 MHz band.

61. In both trunked and conventional systems, mobile station transmitting frequencies will be selected from those available in the 806–821 MHz band and base station transmitting frequencies, from those allocated in the 851–866 MHz band. There will be uniform 25-kHz channeling; and the spacing between associated mobile and base station frequencies, in each instance, will be 45 MHz.

62. This 30-MHz allocation makes possible a number of options for system design. For example, we could authorize 600, single-channel conventional stations. On the other hand, we could have 30 trunked systems, with 20 channels each; or 60, with 10 channels; or 120 with 5 channels. There are other combinations, too; but the important feature of our plan is its flexibility. This flexibility gives assurance that competitive forces in the market place can operate freely and allow the establishment of the best combination of services and facilities possible under the present state-of-the-art.

63. But, initially, as a matter of policy, we have decided not to authorize, in any one area or region, more than 100 25-kHz channel pairs for conventional use and 200 25-kHz channel pairs for trunked systems. The remaining 300 25 kHz frequency pairs will be temporarily reserved to give us an opportunity to study system development trends in the available spectrum. Further, we do not want to allow one type of system to dominate the market, where the other might better serve the needs and requirements of eligible users. Accordingly, as an interim safeguard, we will impose the restriction mentioned.

*Frequency Assignments for Trunked Systems*

64. Applicants for trunked systems will be assigned frequencies in groups, from 5 to 20 channels, depending on the nature of the service to be provided; the area to be served; the class and number of users or customers to be offered facilities; and a number of other factors.

65. Mobile station transmitting frequencies for trunked operation will commence with Channel No. 1 at 820.9875 MHz, followed by Channel No. 2 at 820.9625 MHz, and proceed to the band end with uniform 25-kHz channeling. Base station transmitting frequencies will commence with 865.9875 MHz, Channel No. 1, followed by 865.9625 MHz, Channel No. 2, and proceed to the band end with uniform 25-kHz channeling.[18]

*Frequency Assignments for Conventional Systems*

66. Applicants for conventional systems will be assigned channel pairs in accordance with applicable loading criteria.[19] Where justified, on the basis of the showing made by the applicant, one or more channel pairs will be made available to him for use in his system of communi-

[18] The band ends referred to will be determined by the policy mentioned, above, at para. 63.

[19] See Section 89.802, *et seq.*, of the new rules.

cations. However, the absolute maximum number of channels that will be made available for use in a conventional system will be five, regardless of the number of mobile units the applicant plans to serve.[20]

67. Mobile station transmitting frequencies for conventional systems will commence with Channel No. 1 at 806.0125 MHz, followed by Channel No. 2 at 806.0375 MHz, and proceed to the band end with uniform 25-kHz channeling. Base station transmitting frequencies will commence with Channel No. 1 at 851.0125 MHz, followed by Channel No. 2 at 851.0375 MHz, and proceed to the band end with uniform 25-kHz channeling.[21] As in the case of trunked systems, discussed immediately, above, the spacing between associated mobile and base station frequencies will uniformly be 45 MHz.

*Authorization of Operational Fixed Stations in the 900-MHz Band*

68. Much thought has been given to whether operational fixed stations should be permitted in the 900-MHz band. However, for the same reasons that have persuaded us in the past, we will only allow control stations and then only with specific limitations similar to those now applying to such stations in the 450–470 MHz band.

69. These limitations require that the control station operate on the assigned frequency of the associated mobile station. Also its use is subject to the condition that harmful interference not be caused to stations of licensees authorized to use the frequency for mobile service communications. Further, and in order to minimize potential interference, directional antennas will be required at control stations and their power output will have to be adjusted so that the control station's signal at the controlled station will not exceed by more than 6 dB the signal of an associated mobile transmitting from the same location as the control station.

*Protection Parameters for Operation in the 900-MHz Band*

*In General*

70. We gave much thought to the development of appropriate protection parameters for stations operating at 900 MHz. In doing so, we kept in mind our basic objective of authorizing multiple systems of communication capable of providing a variety of services to a large number of eligible persons and, also, to the public, in general. To attain this objective, we knew we would have to have a regulatory plan which would be relatively simple to implement and which would allow us to pass on each proposal in an orderly but expeditious manner, without recourse to highly complex and time consuming procedural and adjudicatory processes.[22]

71. With this in mind, we first looked into the question of whether protection should be accorded both co-channel and adjacent channel

[20] Where an eligible has requirements for additional frequencies, he must meet those needs through the use of a trunked system. We emphasize a maximum of 5 channel pairs will be assigned to any one licensee for use in a conventional system.

[21] As in the case of trunked systems, the interim criteria will apply, here, too. See para. 63. *supra.*

[22] In the future, when our computer procedures and capabilities are advanced further, new licensing and assignment methodology will be utilized. But, for the present, we must evaluate proposals on the basis of the standards and criteria set out in our opinion and our new 900 MHz rules.

operations. We concluded that adjacent channel protection would not be necessary in making frequency assignments. Our plan of placing all base station transmitters in one band separated by 45 MHz from the base station receiving band eliminates the potential for adjacent channel interference between base stations. We recognize the potential of random adjacent channel interference when a mobile receiver is in close proximity of a base station transmitting on an adjacent channel. We believe, however, that the probability of intersystem interference to be so small and random as not to be a serious problem. Also, the possibility of intersystem adjacent channel interference within a trunked group of frequencies, in our view, can and should be minimized or eliminated by the system operator. Our greatest concern (with regard to adjacent channel interference possibilities) had been that control stations, operating at fixed points, might cause harmful interference of this type. But by limiting power and by our other requirements, we feel that the adjacent channel interference potential will be controlled. Accordingly, we have concluded that adjacent channel interference need not be taken into account in 900 MHz channel assignments, and we have not done so.[23] And, by taking this approach, we will be able to achieve great flexibility in the assignment and use of frequencies in both conventional and trunked systems of communications.

72. We also concluded that transmitter intermodulation interference would not be a factor in making frequency assignments. The principal source of this interference stems from high powered base stations operating in close proximity, both physically and frequency wise. Trunked systems will create this situation by their very nature. But odd order transmitter intermodulation products of the magnitude to cause a problem will fall outside this particular band and the overall allocation structure is such as to minimize the problem.

73. In summary, we have concluded that adjacent channel interference and possible interference from intermodulation can be disregarded, in this instance, in establishing protection parameters for 900-MHz systems.[24] It follows that our assignment plan is based primarily on co-channel operating characteristics, particularly in terms of propagation of signals and on the design of available receiving equipment. With this decided, we turn to a discussion of the various considerations which went into determining the specific co-channel separation requirements for trunked and conventional systems of communication.

*Co-Channel Station Separation*

74. As just mentioned, in establishing mileage separations for co-channel stations, a number of factors were taken into consideration. Among these were permissible power and antenna height. Next, whether the same maxima should be specified for trunked and conventional systems; and, in addition, whether these maxima should be

[23] This is our present thinking, nevertheless we may make a further evaluation of this factor in our Chicago Spectrum Management Region.

[24] As in the case of potential adjacent channel interference, the possible impact of intermodulation interference may be studied further in our Chicago Spectrum Management Region.

identical for urban, in contrast to suburban, operations. Also, the quality of service and the related consideration, interference levels, are important parameters.

75. As to the specification of permissible power and antenna height, propagation characteristics at 900 MHz and probable station locations were looked into.[25] On the latter point, we have concluded that most trunked and conventional stations will be established in areas of relatively high population density. It would seem certain that trunked systems would be located there, since they will be expensive to construct and operate and only in the larger markets will there be present an economic base sufficient to support them. Further, it is most likely that the majority of conventional systems will also be located in heavily populated areas, because it is in such locations that greatest frequency shortages have been experienced.

76. Our study of the desirable level of signals in 900-MHz systems, led us to conclude that we should set maximum power and antenna height at 1 kilowatt (ERP) and 1000 feet (AAT), or the equivalent, respectively.[26] This will be for all trunked operations and for those conventional systems with transmitter sites located within 15 miles from the geographic center of the Urbanized Areas listed at Table 1 of Section 89.751(g) of our new regulations. For conventional systems with transmitter sites more than 15 miles from the geographic center of the referenced Urbanized Areas, we felt lower power and antenna height could be used. In those regions there are generally fewer tall buildings; line-of-sight conditions are not uncommon; and the absorption factor is down. Accordingly, we felt it reasonable to set the limits at 500 watts (ERP) and 500 feet (AAT), respectively.[27] Nonetheless, should these power and antenna height parameters for suburban

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[25] On propagation at 900 MHz, we studied both our own R–6602 curves and the so-called Okumura curves, referred to and relied on by a number of the parties filing comments. We found no great differences in the signal levels predicted. The major distinction between them involved the dissimilar receiving environment in which the test data was gathered. As to this, we applied a correction factor; and with it, there was very close correspondence in the two sets of data. Overall, we believed the data to be highly reliable, and we used it in predicting signal level contours and corresponding service area mileages.

[26] Our objective is to provide a high quality signal to about 50 percent of the locations, 50 percent of the time, within the service area of the stations. To accomplish this objective would require a signal approximately 20 dB above receiver threshold, at the edge of the service area. We have also assumed, based upon the record of this proceeding, that receivers will be available with a sensitivity of 0.45 microvolts across a 50 ohm antenna terminal for 20 dB SINAD. On this basis, the average desired signal level should be 40 dBu at the edge of the service area. Based on available propagation data, R–6602 curves modified to account for mobile antenna receiving heights, urban, suburban, or rural environments, terrain roughness, etc., this quality of service could be afforded in the order of 20 miles in an urban environment with a 1000 feet (AAT) antenna and 1 kilowatt power (ERP). To maintain this quality of service with a margin to permit solid capture of the FM receiver, the interfering signal from a distant co-channel station should be 10 dB less than the desired signal at the boundary of the service area of the protected station. This would mean that the interfering signal could not exceed 30 dBu in 10 percent of the locations, 50 percent of the time.

The value of 40 dBu was employed for a number of reasons, but in simple terms we selected it because we determined that it would, in the absences of interference, enable the licensee of a 900-MHz facility to give a high level of service in the area in which he planned to operate. At 900 MHz this is important, because systems and equipment will be relatively expensive; and there must be some compensating factor for the investment required to establish service.

[27] While it might be argued that greater range in suburban areas is desirable, because the distances between points of communication would seem likely to be more than that found in urban areas, we still believe the lower limits are warranted. In part, our reason has to do with our plan for loading suburban-conventional systems, where 25-mile radii will be employed, not 15-mile radii used in connection with urban-conventional systems. In any event, under suburban/rural conditions, we would expect a useable signal to be received at essentially the same levels as for urban stations with greater power and antenna height.

stations prove to be unduly restrictive, we will take the steps necessary to adjust these values. These are maximum values for power and antenna height; and the applicant, of course, must justify his request based on his coverage requirement.

77. Summarizing on this aspect of the rule making, we have set 1 kilowatt (ERP) and 1000 feet (AAT) as the maximum permissible power and antenna height for trunked systems and for urban-conventional facilities. For suburban-conventional systems, we selected 500 watts (ERP) and 500 feet (AAT) as the limits.[28] With these powers and antenna heights we are certain in all classes of stations will offer satisfactory service to those using them.[29] But there is one further matter to take into account, establishing limits on interference.

78. As to interference, we concluded that the undesired signal should be 10 dB down from the desired one. This will mean that at the 40 dBu contour, of the protected station, the signal strength of the lower priority facility should not exceed 30 dBu. Translated in terms of mileage, it simply means that the two facilities, to afford one another the protection required, must be 70 miles apart. For suburban conventional stations, the distance is less, 45 miles. This is due to the use of lower power and antenna height. Accordingly, these are the values we will use, but they will not be applied in the same manner to trunked and conventional systems, due to the complexity of the loading problem, to be discussed, below.

*Trunked Systems*

79. As just stated, the separation between co-channel trunked systems is to be 70 miles. This standard is to apply in every case, regardless of where the trunked facility is located. This is feasible in trunked operations, because the applicant must make an initial showing that the facilities requested will be occupied in conformity with the applicable loading criteria.

*Conventional Systems*

80. As we have said, for urban-conventional systems, a basic co-channel separation of 70 miles is required to enable the licensee to produce signal levels sufficient to give good, or highly reliable, service. For suburban-conventional systems, the separation is 45 miles. But we cannot apply this criterion directly, because, for conventional system, special provisions must be made to make loading feasible. For this purpose, for now, we have decided to use a simple protected-area approach. For urban-conventional systems, this will be that area circumscribed by a circle with 15 mile radii. This will be measured

[28] The Commission, however, is concerned with the practice of serving mobile users who require small areas of coverage on trunked systems which are essentially wide area coverage systems. Such situations are known to exist in the operation of wide-area repeaters in the lower land mobile bands. While not prohibited, this practice should be discouraged in the 900 MHz band, as it could lead to serious deficiencies in overall spectrum utilization. Accordingly, the Commission will be watchful of the effects of such practice on the efficient development of the 900 MHz band and may impose corrective regulation in the future if warranted.

[29] As previously mentioned, equivalent power for antenna heights in excess of 1000 feet are established and set out at Section 89.651(c), Table 1 of the new rules. For a trunked or urban-conventional station, 1 kilowatt (ERP) is the maximum power regardless of whether an antenna of less than 1000 feet is employed. For suburban-conventional stations, the same principle applies, that is, the maximum power is 500 watts (ERP) regardless of the height of the antenna above average terrain, even when it is less than 500 feet (AAT).

from the designated geographic center of the Urbanized Area involved, as set out in Section 89.751(g), Table 1, of the new rules. Accordingly, all applications for urban-conventional systems (those specifying a transmitter site within 15 miles from the geographic center of the mentioned Urbanized Areas) will be considered, for loading purposes, with any existing or proposed co-channel facility in that area until the channel in question is fully occupied in accordance with the loading criteria set out in our new rules. Further, once a channel pair is assigned for use within the reference 15 mile radii, it will be treated as unavailable for use by any applicant specifying an antenna site outside the 15 mile area, in that vicinity, of course.

81. For suburban-conventional systems (those with transmitter sites more than 15 miles from the geographic center of the mentioned Urbanized Areas), we have decided to consider, for loading purposes, all proposals for facilities specifying a transmitter site within 25 miles of the site of an existing suburban station or within 25 miles of the site specified in a prior filed proposal. Once the channel pair in question is occupied, in accordance with applicable standards, it will be treated as no longer available. Further, once a channel has been selected for occupancy by suburban-conventional stations. it will be unavailable for assignment for use in an urban-conventional system, that is, in the same general area.[30]

82. As stated, these measures are necessary to allow us to load conventional systems vertically. To do this, we must have some area or point of reference. The latter would be a more desirable approach; but as the number of co-channel stations multiplied, the problem of determining which systems should be taken into consideration in deciding whether a given channel was fully occupied or not rapidly becomes an impossible one, at least at the present stage of development of our frequency management program.

83. Accordingly, we plan to use the 15 and 25 mile radaii specification. With this decided, it is necessary to adjust mileage separations for conventional stations to account for the protected areas. Therefore, in the case of urban-conventional systems, assignments on occupied co-channel frequencies will not be made unless the proposed site of the new facility is at least 85 miles from the geographic center of the Urbanized Area involved. As to suburban-conventional systems, assignments on occupied co-channel pairs will not be made unless the site of the proposed station is at least 70 miles from the first suburban co-channel station authorized and this is to be the rule regardless of whether the channel assigned to that station is fully occupied or not.[31]

[30] We wish to be clear on what we mean here. We do not intend to imply that a frequency pair, once designated for use in either an urban-conventional, or suburban-conventional, system, may not be used elsewhere for one type of system or another. This is not the case. Locally, its use will be restricted. Nationally, it will not be.

[31] In any case in which the proposed transmitter site is within the 15 and 25 mile radaii, such application, of course, will be studied with co-channel stations in the protected areas, until such time as the channel is loaded in accordance with applicable standards. We would note, however, that all of these procedures are subject to further study and review, and based on day-to-day operating data, we may find they can be improved. Should this be so, appropriate steps will be taken to reflect this experience.

*Channel Loading Standards*

*In General*

84. For channel loading, in the absence of actual experience and data, especially for trunked systems of radio communication of the type we have under consideration at 900 MHz, we felt we should rely on the number of mobile units in operation as a base from which to set up channel occupancy figures. We have used mobile units, for, over the years, in the land mobile services, we have developed a series of guides for determining the channel requirements of licensees in the several services.

85. For example, in the Police Radio Service, we have found that, as a general rule, a channel pair can be employed in an effective manner in dispatching 50 mobile units of the vehicular type and an even greater number of portable or hand carried units. In this we recognize that there are no two situations exactly alike and that there are many factors to be taken into account. Among them are average message length; the number of units in operation in any given time period; the number of times, each hour, the dispatcher and mobiles originate calls; the number of dispatchers on duty at any one time; the size of the system (the number of communication channels available for use at any one point in time); and, certainly, the nature of the functions and activities of the licensee. All of these factors have an impact on system capacity. Nevertheless, as an overall or average measure, we have determined that in the Police Radio Service, 50 vehicular mobile units per channel is a reasonable and realistic criterion to apply in licensing stations in that service.

86. This may be contrasted to the Business Radio Service. There, the frequencies allocated were intended to be shared more intensively, because they are designated to serve a much broader group of eligibles and there were inherent differences in the nature of the communications of businessmen and of police departments. Consequently, higher loading standards were employed, with each frequency or channel licensed to serve approximately 90 mobiles. In densely populated areas, where the demand for business frequencies turned out to be very great and message loads correspondingly heavy, this norm did not always provide licensees with the communication capabilities they felt they needed. Nonetheless, overall, the 90 mobile criterion proved to be a good guide in licensing stations in the Business Service.

87. Similar conclusions have been arrived at as to frequency loading in the other services. To illustrate, in the Taxicab Radio Service, we know that a frequency pair can be employed effectively in dispatching 150 mobiles or more; and we have set channel loading in that service at a higher level. Further, the communication needs and requirements of licensees in the Power and Petroleum Radio Services are not the same as those in other radio services. This is in part due to the fact that radio facilities are used in different ways and for different purposes by licensees in the several services. But we have found that users can be grouped together for loading purposes; and that mobile units can serve as a good guide for frequency assignment purposes.

88. There is an added factor of some significance. Where a channel is assigned for the exclusive use of a particular licensee, circuit dis-

cipline of a high order can be maintained. It is relatively easy to do so, for the employees using the system are under the direct control of the licensee; and he has an interest in seeing to it that his messages to and from his mobile units are not delayed. Also, system monitoring can be performed in a more efficient manner, since station operators do not have to listen for the signals of other licensees. This eliminates, to a high degree, objectionable interference and message interruptions which cause inefficiencies. With these considerations in mind, we have differentiated between systems which are licensed to provide service to a single entity and those serving several licensees. In doing this, we have designated categories for single licensees; for 2 to 5 licensees; and for over 5 licensees.[32]

89. Summarizing, then, on the basis of the foregoing considerations and also from what we have learned from the vast record in this proceeding, we have developed the norms or general rules to assist us in determining when an assigned frequency is to be treated as occupied, or not occupied, in terms of its capacity to serve in an effective way the requirements of the users. We used this background in assisting us in setting the loading requirements at 900 MHz.

*Loading Trunked Systems*

90. For trunked operations, we have separated user groups under five major headings, with police and fire eligibles in one group; business licensees in another; inter-urban and urban passenger motor carriers in the third group; and, in the fourth group, the "all other" classification, we would include the remaining service categories. For radiotelephone operations, a special criterion is used, due to the nature of such systems of communication.[33]

91. While we recognize that trunking provides added efficiencies in the use of the spectrum and improved communication service, to the present time we are not certain of the degree of improvement in channel capacity. In this regard, while we recognize certain data does exist as to wire line telephone operation, we are not sure that the same criteria can be applied to the types of 900–MHz swstems with which we are concerned, here. There are many variables, and we feel that we do not have sufficient experience with the interplay of these factors to permit us to establish definite loading standards at this time.

92. In the light of these considerations, but using such information as has been made available to us on this subject, we have designated levels for channel loading which we believe most closely approach what actual operating experience will indicate. Accordingly, although these criteria must be treated as interim in nature, we will require, until operating data becomes available, that they be followed. In this connection, we will ask our licensees to maintain traffic records to assist us in any future re-evaluation of our standards.

[32] See Section 89.802 of the new rules which deals with loading requirements for conventional systems.

[33] Applicants may apply for radiotelephone systems only where trunked operation is planned. Conventional systems, because of the efficiency element, may not be employed for this mode of use.

93. For the purpose, then, we require trunked system serving the various user groups to be loaded as follows: [34]

| | 5 channels | 10 channels | 20 channels |
|---|---|---|---|
| Police and fire group | 300 | 750 | 1,500 |
| Business group | 500 | 1,000 | 2,000 |
| Passenger motor carriers | 800 | 1,600 | 2,500 |
| All other groups | 400 | 800 | 1,600 |
| Radiotelephone group | 200 | 400 | 800 |

94. It is our belief that these interim loading parameters will provide users with high quality service on an efficient basis. But, as we have said, we consider these measures as interim ones, which, if necessary or desirable, will be modified to conform with what actual operating conditions show loading should be. Further, as we have indicated, we will not permit conventional systems to be used for radiotelephone operations. Our basic reason for this is that in conventional mode, principally because of the nature of telephonic communication, use of single channels or groups of single channels is inefficient for that purpose.

*Loading Conventional Systems*

95. Loading standards for conventional systems were developed out of the general considerations which we have outlined, above. As in the case of trunked facilities, we have grouped together users which we feel have similar or at least compatible communication requirements. Thus, police and fire users are grouped together. For them, the loading criterion will be 50 mobiles or 100 portable units. This standard is to apply only where the system is not shared with other police and fire users.

96. We have pointed out that some conventional systems will be vertically loaded. In such cases, it is appropriate to use different criteria; and we have done so. Thus, where a channel is shared by 2 to 5 licensees, the 40 vehicular, 80 portable rule will apply. Where it is used by over 5 licensees, the standard will be 30 vehicular and 60 portable units. This is for the police and fire group. The requirements for other groups are set out in the pertinent loading table.[35]

97. There is one difference in loading trunked and conventional systems which we will mention. In the former, no provision is made for eligibles in the Taxicab Radio Service. This is because the method of communication used by taxicab companies is such that no improvement in it can be achieved through trunking. This is the case in that communications generally flow from the dispatcher to the mobile units. Also, we have made no provision in the Taxicab Group for "portables". This is based on the fact that this kind of use is not usual in taxicab operations.

98. In order to qualify for a channel pair for use in a conventional system, an applicant must certify that, in his service category, what-

[34] See Section 89.501 of the new rules which sets out loading requirements for trunked facilities.

[35] See Section 89.802 of the new rules which sets out the various user groups and gives loading requirements for each.

ever that might be, he will have a minimum of 70 percent of the mobiles specified in operation not later than 8 months from the date of the grant of his proposal. If 70 percent of the mobiles specified in the applicant's proposal equals 70 percent of the occupancy requirement of the applicant's service category or group, then the channel pair or pairs involved will be assigned for his exclusive use. Also, just as in the case of trunked operations, when a licensee is able to show that his facility is loaded to 90 percent of its assigned capacity, he may then apply for an additional channel pair or pairs, depending on the facts of the case.

### *Loading Systems Serving Multiple Service Groups*

*Trunked Systems*

99. As we have indicated, we have not allocated the frequencies to the various land mobile services. Therefore, all persons will be permitted to share systems with other eligibles in the private services. Systems serving this type of mix of eligibles in the private services will be loaded in accordance with the "Business Radio Group". This will mean for a 5-channel system, loading will be set at 500 units; for a 10-channel system, at 1,000 units; and for a 20-channel trunked system, 2,000 mobile units.

*Conventional Systems*

100. The same principle as used in trunked operations will apply to conventional systems serving a mix of users. There, we will apply the 70/140 criterion, that is 70 mobiles and 140 portables, where shared by two through five users, and the 50/100 criterion where shared by more than five licensees, are the standards for channel occupancy.

*Other Considerations Applying to Loading Trunked and Conventional Systems*

101. In loading trunked and conventional systems there are certain additional considerations which must be given attention. In this connection, we will examine each proposal to determine the mode of operation asked. Where, for example, an applicant requests a mobile relay facility, if he is to share, it must be with others using the same mode of communication, i.e., mobile relay with mobile relay.[36]

102. Further, two-frequency simplex operation will not be combined with mobile relay use; nor will we combine either of these modes of operation with full duplex systems. They are not compatible with one another.

103. In general, then, we will only assign the same frequencies for systems which involve the same mode of operation. In addition, we will not, where possible, mix user groups in vertical loading. This is because the loading criteria applicable varies, and this makes it undesirable and, at times, impossible to mix users. However, where this becomes necessary, the loading standard for the "mixed group" will be used. Also, in assigning frequencies for shared use in conventional

[36] We wish it to be very clear that we will authorize radiotelephone service only on trunked systems.

systems in any one particular area, we will consider, among other things, the nature of the applicant's activities.

104. These are the major factors that we will take into account in loading channels. But we should note that where an applicant demonstrates that he can meet the requirement for occupancy in the group in which he applies, he will be permitted to use the license facility in any way permitted in the service in which he is eligible.

105. Accordingly, in loading 900 MHz systems, we will not only be concerned with the number of vehicles or portables the applicant plans to use, but we will also take into consideration the planned mode of operation; the service group into which the applicant falls; and, among other features, the number of persons licensed to use a given frequency in a given area. We plan to build our assignment plan on this basis; however, we will continue to examine our methodology, and we will take corrective steps to improve it when we can.

*Additional Requirements for Common User Systems*

106. One further matter, in order to promote the competition envisioned at 900 MHz and, also, to prevent manufacturers or equipment companies from gaining dominance in this market, we will limit such concerns to a single trunked system in a market and to no more than a total of 5 trunked systems nation-wide, except on a showing that the limitation should not apply in a given case. This approach will offer the opportunity to potential competitors to enter the field and to compete successfully with entities of the type mentioned. We are permitting equipment companies into this field, because we want to bring to bear their experience and know-how in the development of trunked and conventional systems. We feel this approach has advantages, for these facilities will be expensive to construct and we are not certain that the means of financing them will be otherwise available at initial stages. Once proven out, and the manufacturers will have an incentive to make the investment to accomplish this, a greater amount of capital will most surely be available. Further, we want pilot systems to be established at an early date; and the manufacturers have clearly demonstrated a willingness to enter the market immediately. While we proceed along these lines with caution, because of possible adverse impacts on competition, with the safeguards we have built into our rules we foresee no problems. Also, we will watch the progress made; study any effects; and take remedial action. However, we wish to observe that we may find no adverse impact; and, in that case, we would extend the privilege to manufacturers to operate in additional markets.

107. In addition to the foregoing, we will expect manufacturers providing commercial service to so design their systems that equipment obtainable from different companies can be readily used in it. We anticipate that an effort toward this end will be undertaken at an early date. However, should this not turn out to be the case, we may find it necessary to develop system standards, ourselves.

108. Finally, we wish to be clear that it is our intention to review and study continually all aspects of our assignment plan. In this regard, we fully recognize that the subject concept is new. It is in part untried and untested. Most likely changes and modifications will have

to be made; and we will be alert to adjust our policies, standards, and criteria to what the public interest requires. This will be done on our own motion; and, in addition, we would expect, and we request, significant input from the land mobile industry and from land mobile users and those representing them. However, we are confident of the soundness of the structure of the measures we have adopted; of the desirability of the goals and objectives we have set for ourselves; and of the benefits to the public that will flow out of our approach to licensing at 900 MHz.

*Subpart S*

109. Subpart S will only be added to Part 89. However, it should be understood that the rules set out in Subpart S are to apply to all systems of communication included under Parts 91 and 93 of the rules. In the future, we plan to incorporate these rules with those of Parts 91 and 93.

110. We would also point out that some of the procedural rules set out in Subpart S may not be in complete harmony with the procedural rules contained in Subpart F of Part 1. Where there is a conflict, the rules in new Subpart S will, of course, be controlling.

*General Accounting Office Requirements*

111. Our new rules will require applicants and licensees of 900 MHz systems to submit certain information and data in addition to that now furnished. This, of course, is subject to approval by the General Accounting Office (GAO). Steps will be taken to obtain the necessary clearance. When GAO has decided the matter, a public notice will be issued. Until then applications may not be filed.

112. Accordingly, IT IS ORDERED, effective June 17, 1974, That Parts 2, 89, 91, and 93 of the Rules are amended as shown in Appendix B, attached hereto; and That the interim guidelines governing the developmental authorization and operation of cellular systems, set forth in Appendix C, are adopted. Authority for this action is found in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

113. IT IS FURTHER ORDERED, That the proceeding in Docket No. 18262 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

ALPHABETICAL LIST OF PARTICIPANTS

Aeronautical Radio, Inc.
AIL, a division of Cutler-Hammer
Airsignal International, Inc.
American Petroleum Institute
American Telephone & Telegraph Co.
American Transit Association
Association of American Railroads
Association of Maximum Service Telecasters, Inc.
Associated Public—Safety Communications Officers, Inc.
Atlanta Transportation Association
Boston Cab Co.
Chicago Communication Service
Chicago Transit Authority
City of Fort Lauderdale, Fla.
Collins Radio Co.
Communications, Inc.

Digital Paging Systems, Inc.
Electronic Industries Association
Gainesville Industrial Electric Co.
General Electric Co. (Major Appliance Business Group)
General Electric Co. (Mobile Radio Department)
GTE Service Corp.
Henry Ford Hospital
Integrated Systems Technology, Inc.
International Association of Chiefs of Police
International Association of Fire Chiefs
International Bridge, Tunnel, and Turnpike Association, Inc.
International Municipal Signal Association
Jeremiah Courtney
Lake Side Communications
Magnavox Co.
Martin Marietta Corp.
Mobilfone, Inc.
Motorola
Mueller Electronics
National Association of Broadcasters
National Association of Business & Educational Radio, Inc.
National Association of Radiotelephone Systems
National Association of Regulatory Utility Commissioners
New Jersey Hospital Association
Radio Broadcasting Co.
Ram Broadcasting Corp.
RCA Corp.
Sangamo Electric Co.
Scott Communications Co.
Southeast Ohio Emergency Medical Service
Special Industrial Radio Service Association, Inc.
St. Louis Electronics
Terminal Taxi Co.
U.S. Department of Justice
U.S. Independent Telephone Association
U.S. Office of Telecommunications Policy
U.S. Small Business Administration
United Telecommunications, Inc.
Utilities Telecommunications Council
Xerox Corp.
Yellow Cab Co. of Greater Buffalo, Inc.

## APPENDIX B

Parts 2, 89, 91, and 93 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

### PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS

1. In § 2.106, columns 5–11 of the table are amended to read as follows:

§ 2.106 Table of Frequency Allocations.

| United States | | Federal Communications Commission | | | | | |
|---|---|---|---|---|---|---|---|
| Band (megahertz) | Allocation | Band (megahertz) | Service | Class of station | Frequency (megahertz) | Nature | OF SERVICES (of stations |
| 5 | 6 | 7 | 8 | 9 | 10 | 11 | |
| * * * | * * * | * * * | * * * | * * * | * * * | * * * | * |
| 470–902 | NG<br>(NG30)<br>(NG43)<br>(US36)<br>(US88)<br>(US100)<br>(US116)<br>(NG63)<br>(NG65) | 806–821<br>821–825<br>825–845<br>845–851<br>851–866<br>866–870<br>870–890<br>890–902 | Land mobile<br>do<br>do<br>do<br>do<br>do<br>do<br>do | Land mobile<br><br>Land mobile<br><br>Base<br><br>Base<br><br> | | Conventional and trunked systems.<br>Reserve.<br>Cellular systems.<br>Reserve.<br>Conventional and trunked systems.<br>Reserve.<br>Cellular systems.<br>Reserve. | |
| 902–928 | G<br>(US36)<br>(US115) | | | | 915 | Industrial, scientific, and medical equipment. | |
| 928–960 | NG<br>(US36)<br>(US116)<br>(US ) | 928–947<br>* * * | Land mobile<br>* * * | * * * | * * * | Reserve.<br>* * * | |

* * * * * * *

2. In the list of footnotes immediately following the table in § 2.106, footnote US115 is amended and a new US footnote is added in proper numerical sequence, to read as follows:

US115 The Frequency 915 MHz is designated for industrial, scientific and medical purposes. Except as provided by US215, emissions must be confined within the limits of ±13 MHz of that frequency. Radiocommunications services operating within those limits must accept any harmful interference that may be experienced from the operation of industrial, scientific, and medical equipment.

US215 Emissions from microwave ovens manufactured on and after January 1, 1980, for operation on the frequency 915 MHz must be confined within the band 902–928 MHz. Emissions from microwave ovens manufactured prior to January 1, 1980, for operation on the frequency 915 MHz must be confined within the band 902–940 MHz. Radiocommunications services operating within the band 928–940 MHz must accept any harmful interference that may be experienced from the operation of microwave ovens manufactured before January 1, 1980.

## PART 89—PUBLIC SAFETY RADIO SERVICES

2. In § 89.103(a), the table is amended to read as follows:

§ 89.103 Frequency stability.

(a) * * *

| Frequency range | All fixed and base stations | All mobile stations | |
|---|---|---|---|
| | | Over 3 W | 3 W or less |
| *Megahertz* | *Percent* | *Percent* | *Percent* |
| Below 25 | 0.01 | 0.01 | 0.02 |
| 25 to 50 | .002 | .002 | .005 |
| 50 to 450 | [1] .0005 | .0005 | .005 |
| 450 to 470 | [3 4] .00025 | .0005 | .0005 |
| 470 to 512 | .00025 | .0005 | .0005 |
| 806 to 820 | .00015 | .00025 | .00025 |
| 851 to 866 | .00015 | .00025 | .00025 |
| 950 to 1,427 | [2] | [2] | [2] |
| 1,427 to 1,435 | [3] .03 | .03 | .03 |
| Above 1,435 | [2] | [2] | [2] |

* * * * * * *

3. In § 89.105, paragraph (a) is amended and paragraph (e) is added to read as follows:

§ 89.105 Types of emission.

(a) Except as provided in paragraphs (c), (d), and (e) of this section, stations in these services will be authorized to use only A3 or F3 emission for radiotelephony. The authorization to use A3 or F3 emission is construed to include the use of tone signals or signalling devices the function of which is limited to establishing or maintaining voice communications or to actuate emergency warning devices used solely for the purpose of advising the general public or emergency personnel of an impending emergency situation.

* * * * * * *

(e) Operation in the frequency bands 806 to 821 and 851 to 866 MHz is limited to F3 emission.

4. In § 89.107(b)(2), the Table is amended to read as follows:

§ 89.107 Emission limitations.

* * * * * * *

(b) * * *

(2) * * *

| Frequency band (megahertz) | Authorized bandwidth (kilohertz) | Frequency deviation (kilohertz) |
|---|---|---|
| 25 to 50 | 20 | 5 |
| 50 to 150 | [1] 20 | [1] 5 |
| 150 to 450 | 20 | 5 |
| 450 to 470 | [1] 20 | [1] 5 |
| 470 to 512 | 20 | 5 |
| 806 to 821 | 20 | 5 |
| 851 to 866 | 20 | 5 |

* * * * * * *

5. In § 89.109, Paragraphs (d) and (i) are amended to read as follows:

§ 89.109 Modulation requirements.

* * * * * * *

(d) Each transmitter in the frequency ranges 25 to 50, 150.8 to 162, 450 to 512, 806 to 821, and 851 to 866 MHz shall be equipped with an audio low-pass filter. Such filter shall be installed between the modulation limiter and the modulated stage and shall meet the specifications contained in paragraph (h) or (i) of this section. The provisions of this paragraph do not apply to transmitters of licensed radiocommunications systems operated wholly within the limits of one or more of the territories or possessions of the United States or Alaska, or Hawaii, except those systems operating in the frequency ranges 806 to 821 MHz, and 851 to 866 MHz.

* * * * * * *

(i) For stations authorized in the 450–470 MHz band on or after November 1, 1967, and for all stations authorized in the 470–512, 806–821, and 851–866 MHz bands, at audio frequencies between 3 kHz and 20 kHz, the low-pass filter required by the provisions of paragraph (d) of this section shall have an attenuation greater than the attenuation at 1 kHz by at least: 60 $\log_{10}$ (f/3) decibels. Where "f" is the audio frequency in kHz. At audio frequencies above 20 kHz, the attenuation shall be at least 50 decibels greater than the attenuation at 1 kHz.

* * * * * * *

6. In § 89.111(b), the Table is amended to read as follows:

§ 89.111 Power and antenna height.

* * * * * * *

(b) * * *

| Frequency range (megahertz) | Maximum plate power input to the final radio frequency stage (watts) | Maximum effective radiated power (watts) |
|---|---|---|
| 1.3 to 3 | 2,000 | |
| 3 to 25 | 1,000 | |
| 25 to 100 | 500 | |
| 100 to 470 | 600 | |
| 470 to 512 | | 1,000 |
| 806 to 821 | [3] | [3] |
| 851 to 866 | [3] | [3] |
| Above 950 | [1] | [1] |

[1] To be specified in the station authorization.
[2] For power limitations see sec. 89.651.
[3] The output power of a transmitter on any authorized frequency in this service shall not exceed 250 W (24 dBw).

* * * * * * *

7. In Part 89, a new Subpart S is added to read as follows:

SUBPART S—SPECIAL REGULATIONS GOVERNING LICENSING AND USE OF FREQUENCIES IN THE 806–821 MHz AND 851–866 MHz BANDS

GENERAL INFORMATION

Sec.
89.601 Purpose.
89.602 Definitions.
89.603 Organization and applicability of rules.
89.604 Eligibility.
89.605 Station identification.

GENERAL RESTRICTIONS AND LIMITATIONS ON OPERATION OF CONVENTIONAL AND TRUNKED SYSTEMS AUTHORIZED IN THE 806–821 MHZ AND 851–866 MHZ BANDS

Sec.
89.651 Limitations on power and antenna height.
89.652 Restrictions on operational fixed stations.
89.653 Restriction on interconnection.
89.654 Restriction on permissible communications.
89.655 Limitations on use and mode of operation of systems licensed in the 806–821 MHz and 851–866 MHz bands.
89.656 Special conditions governing the furnishing of radio equipment by licensees.
89.657 Restriction on licensing manufacturers and equipment suppliers to furnish service in the 806–821 MHz and 851–866 MHz bands.
89.658 Acceptability of transmitters for licensing in the 806–821 and 851–866 MHz bands.

APPLICATION AND PROCESSING PROCEDURES

89.701 Forms to be used.
89.702 Supplemental information to be furnished by applicants for facilities under this subpart.
89.703 Supplemental reports required of licensees authorized under this subpart.
89.704 Processing of applications.

POLICIES GOVERNING THE SELECTION AND ASSIGNMENT OF FREQUENCIES FOR USE IN THE 806–821 MHZ AND 851–866 MHZ BANDS

89.751 Selection and assignment of frequencies.

CHANNEL LOADING REQUIREMENTS FOR TRUNKED AND CONVENTIONAL SYSTEMS

89.801 Trunked systems.
89.802 Conventional systems.
89.803 Other criteria to be applied in assigning channels for use in conventional systems of communication.
89.804 Other criterion to be applied in licensing channels for use in trunked systems of communication.

## SUBPART S—SPECIAL REGULATIONS GOVERNING LICENSING AND USE OF FREQUENCIES IN THE 806–821 MHZ AND 851–866 MHZ BANDS

GENERAL INFORMATION

§ 89.601 Purpose.

The purpose of this subpart is to set out the regulations governing licensing and use of conventional and trunked systems of communication to operate in the 806–821 MHz and 851–866 MHz bands.

§ 89.602. Definitions.

*Channel loading.* The number of mobile stations assigned to operate on a co-channel basis within the same service area.

*Co-channel interference.* Interference caused in one communication channel by a transmitter operating on the same channel.

*Conventional radio system.* A method of operation in which one or more radio frequency channels are assigned to mobile and base stations but are not employed as a trunked group. An "urban-conventional system" is one whose transmitter site is located within 15 miles of the geographic center of any of the first 50 urbanized areas (ranked by population) of the United States. A "suburban-conventional system" is one whose transmitter site is located more than 15 miles from the geographic center of the first 50 urbanized areas. See Table 21, Rank of Urbanized Areas in the United States by Population, page 1–87, U.S. Census (1970).

*Duplex radio communication.* A method of radio communications, commonly used in radiotelephone systems, involving simultaneous two-way independent transmission in both directions accomplished through the use of two radio frequency channels, one for each direction of transmission.

*Geographic center.* The geographic center of an urbanized area is defined by the coordinates given at Table 1 of paragraph (g) of Section 89.751 of this subpart.

*Trunk (telephony).* A one- or two-way channel provided as a common traffic artery between switching equipment.

*Trunk group.* All of the trunks of a given type or characteristic that extend between two switching points.

*Trunked radio system.* A method of operation in which a number of radio frequency channel pairs are assigned to mobile and base stations in the system for use as a trunk group.

§ 89.603 Organization and applicability of rules.

The rules in this subpart set forth the procedural and substantive regulations which apply, distinctly, to land mobile systems licensed to operate in the 806–821 MHz and 851–866 MHz bands. They are to be read in conjunction with applicable requirements contained in Parts 89, 91, and 93 of this chapter; however, to the extent the provisions of this subpart conflict with those set out in Parts 89, 91, and 93 of this chapter, the former are to be treated as controlling, insofar as licensing and use of frequencies in the 806–821 MHz and 851–866 MHz bands are involved.

§ 89.604 Eligibility.

The following persons and entities are eligible for licensing in the 806–821 MHz and 851–866 MHz bands.

(a) Any person or entity eligible for licensing under either Part 89, 91, or 93 of this chapter.

(b) Any person or entity proposing to provide dispatch service, subject to the restrictions set forth in this subpart, to any person or entity eligible for licensing under either Part 89, 91, or 93 of this chapter on a not-for-profit, cost-shared basis.

(c) Any person or entity, except wire line telephone common carriers, proposing to provide dispatch service, subject to the restrictions set forth in this subpart, to any person or entity eligible under Part 89, 91, or 93 of this chapter.

(d) Any person or entity, except wire line telephone common carriers, proposing to provide radiotelephone service to the public over trunked systems of communication.

§ 89.605 Station identification.

(a) Conventional systems of communication shall be identified in accordance with existing regulations governing such matters.

(b) Trunked systems of communication shall be identified through the use of an automatic device which transmits the call sign of the base station facility at 30-minute intervals. Such station identification shall be made on the lowest frequency in the base station trunk group assigned to the licensee. Should this frequency be in use at the time station identification is required, such identification may be made at the termination of the communication in progress on this frequency. Identification may be by voice or International Morse Code. When the call sign is transmitted in International Morse Code, it should be at a rate of between 15 to 20 words per minute; and it should be transmitted by the means of tone modulation of the transmitter, the tone frequency being between 800 and 1000 hertz. The level of modulation is to be high enough to be clearly discernable, but low enough not to be disruptive of voice communications in progress.

GENERAL RESTRICTIONS AND LIMITATIONS ON OPERATION OF CONVENTIONAL AND TRUNKED SYSTEMS AUTHORIZED IN THE 806–821 MHZ AND 851–866 MHZ BANDS

§ 89.651 Limitations on power and antenna height.

(a) The maximum effective radiated power and antenna height, respectively, for base stations used in suburban-conventional systems of communication operating in the 851–866 MHz band shall be no greater than 500 watts (27 dBw) and 500 feet above average terrain (AAT). These are maximum values; and applicants, of course, will be required to justify power levels and antenna heights requested.

(b) The maximum effective radiated power and antenna height, respectively, for base stations used in trunked and urban-conventional systems authorized in the 851–866 MHz band shall be no greater than 1 kilowatt (30 dBw) and 1000 feet above average terrain (AAT), or the equivalent thereof, determined from Table 1 of subparagraph (b) of this section. These are maximum values; and applicants, of course, will be required to justify power levels and antenna heights requested.

(c) Table 1. Equivalent powers and antenna heights for base stations operating in the 851–866 MHz band.

| Antenna height (AAT) (in feet): | *Power (watts)*[1] |
|---|---|
| 4,501–5,000 | 65 |
| 4,001–4,500 | 70 |
| 3,501–4,000 | 75 |
| 3,001–3,500 | 100 |
| 2,501–3,000 | 140 |
| 2,001–2,500 | 200 |
| 1,501–2,000 | 350 |
| 1,001–1,500 | 600 |
| Up to 1,000[2] | 1,000 |

[1] Power is given in terms of effective radiated power (watts).
[2] Maximum permissible power and antenna height are 1 kilowatt (ERP) and 1,000 feet (AAT), respectively. Licensees will not be permitted to exceed the specified 1,000-watt power limitation, regardless of whether or not use is made of an antenna which is less than 1,000 feet in height (AAT).

(d) The maximum output power for mobile stations operating in the 806–821 MHz band is 100 watts (20 dBw).

§ 89.652 Restrictions on operational fixed stations.

(a) Except for control stations, operational fixed operations will not be authorized in the 806–821 and 851–866 MHz bands.

(1) Control stations associated with one or more mobile relay stations, will be authorized only on the assigned frequency of the associated mobile station. Use of a mobile service frequency by a control station of a mobile relay system is subject to the condition that harmful interference not be caused to stations of licensees authorized to use the frequency for mobile service communication.

(2) Control stations shall in all cases employ directional antennas with the main lobe of radiation directed toward the station, or stations, being controlled. In each case, the antenna used, consistent with reasonable design, shall produce a radiation pattern that provides only the coverage necessary to permit satisfactory control of each mobile relay station and limits radiation in other directions to the extent feasible.

(3) The strength of the signal of a control station, controlling a single mobile relay station, may not exceed, by more than 6 dB, at the antenna terminal of the mobile relay receiver, the signal strength produced there by a unit of the associated mobile station. When the fixed station controls more than one mobile relay station, the 6 dB control-to-mobile signal difference need be verified at only one of the mobile relay station sites. The measurement of the signal strength of the mobile unit must be made when such unit is transmitting from the control station location or, if that is not practical, from a location which is not more than one-fourth mile from the control station site.

(4) Each application for a control station to be authorized under the provisions of this paragraph shall be accompanied by a statement certifying that the output power of the proposed transmitter will be adjusted to comply with the foregoing signal level limitation. Records of the measurements used to determine the signal ratio shall be kept with the station records and shall be made available, upon request, for inspection by Commission personnel.

§ 89.653 Restriction on interconnection.

(a) Automatic interconnection with land line facilities shall be permitted only in those cases where the licensee provides radio telephone services to the public on a commercial basis.

(b) Systems licensed for use by an individual person or entity eligible under either Part 89, 91, or 93 of this chapter; or to any person or entity providing service to any person or entity eligible under either Part 89, 91, or 93 on a not-

for-profit, cost-shared basis; or to any person or entity providing service on a commercial basis to any class of persons or entities eligible under Part 89, 91, or 93 of this chapter shall not be interconnected with the wire line facilities of any telephone company, except where such interconnection is accomplished manually at the licensee's or user's place of business. Further, such interconnection may not be accomplished at any station or control point common to more than one licensee or user.

(c) In those situations where a licensee is permitted to interconnect with the facilities of a land line carrier pursuant to this section, it shall be the obligation of the local land line carrier to provide interconnection under reasonable terms and conditions upon reasonable request therefor.

§ 89.654 Restriction on permissible communications.

(a) Systems licensed for use by persons eligible under Parts 89, 91, and 93 of this chapter may be employed solely for the transmission of messages permissible in the radio service or services in which those persons are so eligible.

(b) Trunked radiotelephone systems licensed for use by the public shall not be subject to the limitation set out at paragraph (a) of this section.

§ 89.655 Limitations on use and mode of operation of systems licensed in the 806–821 MHz and 851–866 MHz bands.

(a) A system licensed for use by a person or entity eligible under either Part 89, 91, or 93 of this chapter may be employed for any purpose or operated in any manner which is consistent with the regulations governing the service in which the user is eligible; *Provided,* the loading standard which applies to the system is met and the channel or channel pairs are assigned to that person or entity for its exclusive use.

(b) Trunked systems licensed to be used by more than one person or entity may be employed for telephony, only.

(c) Systems licensed to provide radiotelephone service to the public on a commercial basis may offer such service employing full duplex, continuous carrier mode of operation; *Provided, however,* facilities of this type will be authorized for operation in trunked mode, only.

(d) Systems licensed to provide service to more than one person or entity eligible under Part 89, 91, or 93 of this chapter may, in conformity with the following restrictions, be used:

(1) Only for purposes expressly allowed under Parts 89, 91, and 93 of this chapter.

(2) Only by persons who are shown to be eligible for facilities, either under this subpart or in the radio services included under Parts 89, 91, and 93 of this chapter.

(3) Only for the transmission of messages or signals permitted in the service in which the participants are eligible.

§ 89.656 Special conditions governing the furnishings of radio equipment by licensees.

Every licensee of a trunked or conventional system furnishing service on a commercial basis, under this subpart, shall afford every user or customer the option of purchasing or leasing the necessary associated control and mobile station radio gear. Should the user or customer elect to lease the equipment, he (the user or customer) must be given the further right to cancel the lease agreement at any time, without penalty, on ten days' written notice to the licensee.

§ 89.657 Restriction on licensing manufacturers and equipment suppliers to furnish service in the 806–821 MHz and 851–866 MHz bands.

No person engaged in the manufacture or sale of radio equipment to be used in systems authorized under this subpart, or who has any direct or indirect interest in any such manufacturing or sales enterprise, may be licensed to operate more than one common user trunked system of communications used to provide commercial service to eligibles or to the public in any one market, and no more than 5 such systems in the United States, unless a showing is made demonstrating that the public interest, convenience, and necessity would be served and that an exception is warranted.

§ 89.658 Acceptability of transmitters for licensing in the 806–821 and 851–866 MHz bands.

Except for transmitters used in development stations, each transmitter utilized by a station authorized for operation in these bands must be a type which is included on the Commission's current Radio Equipment List, or be of a type which has been type-accepted by the Commission for use in these bands.

APPLICATION AND PROCESSING PROCEDURES

§ 89.701 Forms to be used.

Applications for conventional and trunked radio facilities shall be submitted on FCC Form 400, and such applications shall be filed with the Commission, at its offices in Washington, D.C. Where the facility is to be established in the Chicago Regional area, FCC Form 425 shall be used and all such application shall be filed with the Chicago Regional Office.

§ 89.702 Supplemental information to be furnished by applicants for facilities under this subpart.

(a) Applicants for conventional or trunked systems of communication shall, in addition to the information required by FCC Form 400 or FCC Form 425 furnish the following data and material.

(1) Where the applicant is a person eligible under Part 89, 91, or 93 and proposes to provide dispatch service solely to itself, then the applicant need submit only the information required by FCC Form 400 or 425, except as otherwise indicated in this section, below.

(2) Where the applicant is a person proposing to provide dispatch service to eligibles under either Part 89, 91, or 93 of this chapter on a not-for-profit, cost-shared basis, he shall furnish:

(i) A copy of the plan or agreement under which service will be offered. It must be in sufficient detail to show that such service will be provided at cost.

(ii) A statement of the purposes for which the system is to be used and the planned mode of operation.

(iii) The names and addresses of each person to participate in the sharing arrangement.

(iv) A statement showing that each participant is eligible to use the system for the purposes for which it is to be employed.

(3) Where the applicant is a person proposing to provide dispatch service to eligibles under either Part 89, 91, or 93 of this chapter on a commercial basis, he shall supply:

(i) A statement of the purposes for which the system is to be used and the planned mode of operation.

(ii) A statement certifying that no person not eligible to use the proposed facility for the purposes for which it is to be authorized will be offered or provided service over or through the licensee's system.

(iii) A copy of the basic agreement under which the dispatch service will be offered.

(4) Where the applicant is a person proposing to provide radiotelephone service to the public on a commercial basis, he shall furnish:

(i) A statement of the purposes for which the system is to be used and the planned mode of operation.

(ii) A copy of the basic agreement under which the radiotelephone service will be offered.

(5) Where the applicant proposes to provide service to other persons on a commercial basis, and where it has any interest of any kind whatsoever in any company engaged either in the sale or manufacture of radio equipment, in addition to the information required in this section, it shall accompany its application with:

(i) A full description of the applicant's interest in any such company or companies.

(ii) A list of any other radio station facility or facilities in which the applicant has any interest whatsoever.

(iii) The location and station designation of any facility identified in subparagraph (ii) of paragraph (a) (5) of this section.

(iv) Where the applicant has any interest whatsoever in any concern which provides radio communication services to persons other than itself, as to all such concerns, the applicant shall include in his filing the information required by subparagraphs (ii) and (iii) of paragraph (a)(5) of this section.

(b) All applicants for conventional systems shall specify the number of vehicle or portable units to be placed in operation upon grant of the authorization and the number of such units that will be placed in operation within 8 months of the date of grant.

(c) All applicants of trunked systems shall specify the number of mobile units to be placed in operation within the term of the license.

(d) Each applicant shall furnish a functional system diagram illustrating the inter-relationship of all stations being applied for, together with technical details (including antenna height (AAT) and effective radiated power (ERP)), together with his proposed area of coverage and the signalling methods he will employ.

§ 89.703 Supplemental reports required of licensees authorized under this subpart.

(a) Licensees providing service to persons eligible either under Part 89, 91, or 93, on a not-for-profit, cost-shared basis, shall, prior to furnishing service to any user not previously identified, notify the Commission of its intention to do so, and furnish the Commission with sufficient information as to the prospective user to enable it to determine whether this person is eligible to participate in the sharing arrangement. Service to the participant may commence 30 days after such notification, unless the licensee is advised, in writing, of any deficiency in the licensee's showing or in the eligibility of the person to be served. In the latter case, until the deficiency is corrected or the user is shown to be qualified and eligible, he may not participate in the use of the system.

(b) Where a licensee provides service under the terms of an agreement, on a not-for-profit, cost-shared basis, such agreement may not be modified in any material respect until the changes in the terms and conditions are reported to, and approved by, the Commission.

(c) Where a licensee provides service on a commercial basis, he shall not modify, in any material respect, the basic agreement under which such service is provided until the changes in its terms and conditions are reported to, and approved by, the Commission.

(d) Licensees offering service on a commercial basis to any person or entity eligible under either Part 89, 91, or 93, or to the public, must report, annually and at the time of filing applications for renewal of license, the number of mobile units being served; and such licensees shall, at that time, give the name and full address of each customer; the number of mobile units operated by each of them; and such other data as the party reporting may feel would be helpful in determining channel occupancy of the system, together with a certification that the terms of the basic agreement under which service is provided have not been modified or changed in any material respect. Such data shall be current as of the day and date falling 30 days prior to the date on which such licensees are required to file for renewal of their licenses, or, for the annual reports, at the close of the 12-month period covered by the annual report. The licensees of systems of the type covered by the provisions of this rule shall maintain records which, if referred to, will support any of the information required to be filed in the subject report. These records shall be available to the Commission upon request.

(e) Licensees furnishing service to eligible persons on a not-for-profit, cost-shared basis, shall, within 30 days of the close of the first full calendar year of operation, and each year thereafter, submit a report setting out the following information:

(1) A certification that during the period covered by the report, services have been offered and provided in accordance with the terms and conditions of the agreement approved by the Commission; that said agreement has not been modified or changed, except with the express approval of the Commission; and that records have been kept which show that service and facilities were made available on a not-for-profit, cost-shared basis. These records shall be available to the Commission upon request.

(2) A list of persons served during the period covered by the report.

(3) The number of mobile units operated by each user and a statement showing whether these units are of the vehicular or portable type.

(4) The total number of units served by the system during the period of the report, together with the number served on January 1st and on December 31st of the year of the report; and the average number of such mobile units served during this period of time.

(f) Licensees of trunked systems serving only themselves shall report annually, and at the time of filing applications for renewal of licenses, the number of mobile units being served, together with such other data as the licensees may feel would be helpful to the Commission in determining channel occupancy of their systems. Records supporting the information required in these reports shall be maintained by the licensees and shall be available to the Commission upon request.

(g) All licensees of conventional systems, in addition to the other requirements of this section, shall report the number of vehicular and portable units placed in operation within 8 months of the date of the grant of his license. Such reports shall be filed within 30 days from that date.

(h) All licensees of trunked systems shall report the date on which construction of the authorized facility began; that part of the facility completed; and the schedule for completion of construction of any part of the system not yet finished.

§ 89.704 Processing of applications.

(a) Applications for facilities to operate in the 806–821 MHz and 851–866 MHz bands will be processed as follows:

(1) All applications will first be considered to determine whether they are substantially complete and acceptable for filing. If so, they will be assigned a file number and put in pending status. If not, they will be returned to the applicant.

(2) All applications in pending status will be processed in the order in which they are received. The order in which they are received will be determined by the time and date on which the original proposal was filed with the Commission.

(3) Each application will then be reviewed to determine whether it can be granted. Should it be granted, frequencies or channels will be assigned by the Commission in accordance with its assignment policies and loading criteria.

(4) Where, upon examination, it is determined that the proposal must be dismissed, that application will be returned; and the priority accorded it will no longer obtain.

(5) Where, upon examination, it is determined that the proposal cannot be granted or dismissed; but that it must be designated for hearing, such action will be taken. In this event, the applicant will not lose the priority accorded it and frequencies will be set aside for use in the proposed system in the event of ultimate favorable action by the Commission on the application. Should the proposal be denied, the frequencies reserved will become immediately available for assignment to other persons; and this will be so regardless of whether or not appeal by any party to the proceeding is made to the courts: *Provided, however,* the grant will not become effective for a period of thirty days to allow any interested party to request a stay of the action the Commission plans to take.

POLICIES GOVERNING THE SELECTION AND ASSIGNMENT OF FREQUENCIES FOR USE IN THE 806–821 MHZ AND 851–866 MHZ BANDS

§ 89.751 Selection and assignment of frequencies.

(a) The Commission will select and assign frequencies for operation in the 806–821 MHz and 851–866 MHz bands.

(1) For trunked systems, the assignment of frequencies will be made, in accordance with applicable loading criteria, in minimum groups of five and in maximum groups of twenty channel pairs. All mobile and control station frequencies will be chosen from those allocated in the 806–821 MHz band. Mobile station transmitting frequencies will commence with Channel No. 1 at 820.9875 MHz, followed by Channel No. 2 at 820.9625 MHz, and proceed to the band end with uniform 25-kHz channeling; and base station transmitting frequencies will be selected by the Commission and assigned from those allocated in the 851–866 MHz band, commencing with Channel No. 1 at 865.9875 MHz, followed by Channel No. 2 at 865.9625 MHz, and proceed to the band end with uniform 25-

kHz channeling. The spacing between associated mobile and base station frequencies shall be, uniformly, 45 MHz.

(2) For conventional systems, the assignment of frequencies will be made in accordance with applicable loading criteria. Accordingly, depending upon the number of mobile units to be served, the applicant may either be required to share a channel, or, if the applicant shows a sufficient number of mobile units to warrant the assignment of one or more channels for its exclusive use, he may be licensed to use such channel or channels on an exclusive basis in his area of operation.

(3) For conventional systems, mobile station transmitting frequencies, as well as those for use by control stations, will be selected from those allocated in the 806–821 MHz band. Mobile and control station transmitting frequencies will commence with Channel No. 1 at 806.0125 MHz, followed by Channel No. 2 at 806.0375 MHz, and proceed to the band end with uniform 25-kHz channeling. Base station transmitting frequencies will be selected and assigned from those allocated in the 851–866 MHz band, with Channel No. 1 commencing at 851.0125 MHz, followed by Channel No. 2 at 851.0375 MHz, and proceed to the band end with uniform 25-kHz channeling. The spacing between associated mobile and base station frequencies shall be, uniformly, 45 MHz.

(b) Stations authorized by the Commission to operate in the 806–821 MHz and 851–866 MHz band will be afforded protection solely on the basis of the mileage separation criteria set out below. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account.

(1) For trunked systems, the separation between co-channel systems shall be 70 miles.

(2) For urban-conventional systems, the separation between co-channel base stations shall be 70 miles; provided, however, where the transmitter site of a previously authorized, co-channel facility is located at any point within 15 miles from the geographic center of any one of the 50 Urbanized Areas listed in Table 1, at paragraph (g) of this section, then the distance between the transmitter site of the proposed co-channel conventional system and the geographic center of the urbanized area involved shall be a minimum of 85 miles.

(3) For suburban-conventional systems, the separation between co-channel base stations shall be 45 miles; *Provided, however,* for all proposals for facilities specifying a transmitter site within 25 miles of the site of an existing suburban-conventional station, or within 25 miles of the site specified in a prior filed application for such station, the separation shall be 70 miles.

(c) Notwithstanding the provisions of paragraph (b)(2) of this section, where an assigned channel of an urban-conventional system is not fully loaded in accordance with applicable loading criteria, and where the transmitter site of that system is located within 15 miles from the center of the urbanized area involved, the Commission may issue additional authorizations for facilities to be located within 15 miles of the center of that urbanized area until the channel in question is occupied in conformity with applicable loading criteria.

(d) Notwithstanding the provisions of paragraph (b)(3) of this section, where an assigned channel of a suburban-conventional system is not fully loaded in accordance with applicable loading criteria, the Commission may issue additional authorizations for facilities to be located within 25 miles of the transmitter site of the first station authorized until the channel in question is occupied in conformity with applicable loading criteria.

(e) UHF television translator stations using UHF output channels from Channel 70 through Channel 83, shall operate on a secondary basis to land mobile stations using the UHF bands allocated under this subpart for land mobile use, and, accordingly, such television translator stations will not be protected from interference from such authorized land mobile stations.

(f) Pending further negotiations with Canada and Mexico, land mobile stations operating in the 806–890 MHz band shall do so on a secondary basis to any Canadian or Mexican television station placed in operation on television channels in this band.

(g) Table 1, Urbanized Areas.

| Urbanized area | Geographic center | |
|---|---|---|
| | North latitude | West longitude |
| Akron, Ohio | 41°05'00" | 81°30'44" |
| Albany-Schenectady-Troy, N.Y | 42°39'01" | 73°45'01" |
| Atlanta, Ga | 33°45'10" | 84°23'37" |
| Baltimore, Md | 39°17'26" | 76°36'48" |
| Birmingham, Ala | 33°31'01" | 86°48'36" |
| Boston, Mass | 42°21'24" | 71°03'24" |
| Buffalo, N.Y | 29°45'26" | 95°21'37" |
| Chicago, Ill | 41°52'28" | 87°38'22" |
| Cincinnati, Ohio | 39°06'07" | 84°30'35" |
| Cleveland, Ohio | 41°29'51" | 81°41'50" |
| Columbus, Ohio | 39°57'47" | 83°00'17" |
| Dallas, Tex | 32°47'09" | 96°47'37" |
| Dayton, Ohio | 39°45'32" | 84°11'43" |
| Denver, Colo | 39°44'58" | 104°59'22" |
| Detroit, Mich | 42°19'48" | 83°02'57" |
| Fort Lauderdale-Hollywood, Fla | 26°07'30" | 80°09'00" |
| Fort Worth, Tex | 32°44'55" | 97°19'44" |
| Houston, Tex | 29°45'26" | 95°21'37" |
| Indianapolis, Ind | 39°46'07" | 86°09'46" |
| Jacksonville, Fla | 30°19'44" | 81°39'42" |
| Kansas City, Mo-Kans | 39°04'56" | 94°35'20" |
| Los Angeles, Calif | 34°03'15" | 118°14'28" |
| Louisville, Ky., Ind | 38°14'47" | 85°45'49" |
| Miami, Fla | 25°46'37" | 80°11'32" |
| Memphis, Tenn., Miss | 35°08'46" | 90°03'13" |
| Milwaukee, Wis | 43°02'19" | 87°54'15" |
| Minneapolis-St. Paul, Minn | 44°58'57" | 93°15'43" |
| New Orleans, La | 29°56'53" | 90°04'10" |
| New York-Northeastern New Jersey | 40°45'06" | 73°59'39" |
| Norfolk-Portsmouth, Va | 36°51'10" | 76°17'21" |
| Oklahoma City, Okla | 35°28'26" | 97°31'04" |
| Omaha, Nebr-Iowa | 41°15'42" | 95°56'14" |
| Philadelphia, Pa., N.J | 39°56'58" | 75°09'21" |
| Phoenix, Ariz | 33°27'12" | 112°04'28" |
| Pittsburgh, Pa | 40°26'19" | 80°00'00" |
| Portland, Oreg., Wash | 45°31'06" | 122°40'35" |
| Providence-Pawtucket-Warwick, R.I., Mass | 41°49'32" | 71°24'41" |
| Rochester, N.Y | 43°09'41" | 77°36'21" |
| Sacramento, Calif | 38°34'57" | 121°29'41" |
| St. Louis, Mo., Ill | 38°37'45" | 90°12'22" |
| St. Petersburg, Fla | 27°46'18" | 82°38'19" |
| San Antonio, Tex | 29°25'37" | 98°29'06" |
| San Bernardino-Riverside, Calif | 34°06'30" | 117°17'28" |
| San Diego, Calif | 32°42'53" | 117°09'21" |
| San Francisco-Oakland, Calif | 37°46'39" | 122°24'40" |
| San Jose, Calif | 37°20'16" | 121°53'24" |
| Seattle, Wash | 47°36'32" | 122°20'12" |
| Springfield-Chicopee-Holyoke, Mass., Conn | 42°06'21" | 72°35'32" |
| Toledo, Ohio-Mich | 41°39'14" | 83°32'39" |
| Washington, D.C.-Maryland-Virginia | 38°53'51" | 77°00'33" |

CHANNEL LOADING REQUIREMENTS FOR TRUNKED AND CONVENTIONAL SYSTEMS

§ 89.801 Trunked systems.

(a) Trunked systems of communication will be authorized on the basis of the loading criteria set out in this section.

(b) Table 1, Loading requirements for trunked systems.

| Service group [1] | Vehicular radio units [2] | | |
|---|---|---|---|
| | 5-channel systems | 10-channel systems | 20-channel systems |
| Police and fire group | 300 | 750 | 1,500 |
| Business radio group | 500 | 1,000 | 2,000 |
| Motor carrier group (urban and inter-urban passenger carriers only) | 800 | 1,600 | 2,500 |
| Other services group | 400 | 800 | 1,600 |
| Mixed service group | 500 | 1,000 | 2,000 |
| Radiotelephone group | 200 | 400 | 800 |

[1] No provision is made for use of trunked systems by persons eligible in the taxicab radio service, since this mode of communication is not compatible with normal transmission requirements of taxicab companies.
[2] For loading trunked systems of communication, no distinction is made between vehicular and portable mobile units.

(c) Each applicant for trunked facilities shall certify that a minimum of 70 percent of the mobile units specified in its application will be placed in operation not later than the date on which the term of his license for the system expires.

(d) Any licensee, at any time its authorized trunked system is occupied to 90 percent of its specified capacity, may apply for additional channels. Assignments will be made based, first, upon the availability of frequencies for use by the licensee; and, second, based upon the showing made by the licensee of its requirements for additional channel pairs.

(e) Licensees of trunked facilities must commence construction within six months from the date of grant and complete construction within one year or such further time as the Commission may allow.

§ 89.802 Conventional systems.

(a) Conventional systems of communication will be authorized on the basis of the loading criteria set out in this section.

(b) Table 1, Loading requirements for conventional systems.

| Service group | Channel loading—units per channel vehicular/portable | | |
|---|---|---|---|
| | Single licensee | 2-5 licensees | Over 5 licensees |
| Police and fire group.[1] | 50/100 | 40/80 | 30/60 |
| Business radio group | 90/180 | 70/140 | 50/100 |
| Taxicab radio group.[2] | 150 | 125 | 100 |
| Motor carrier radio group (urban and inter-urban passenger motor carriers, only) | 150/300 | 125/250 | 100/200 |
| Other services group | 70/140 | 50/100 | 40/60 |
| Mixed service group | | 70/140 | 50/100 |

[1] Full sharing of channels allocated in the 806-821 and 851-866 MHz bands is permissible; and where the eligibles in one service share facilities in common with persons eligible in one of the other radio services, i.e., where channels are jointly used on this basis, then the loading criteria shall be 70/140 or 50/100 mobile and portable units per channel.
[2] No loading criteria for portable units in the taxicab radio group are given, since the requirement for units of this type has not been established in that service.

(c) Every applicant for a conventional system of communication shall certify that a minimum of 70 percent of the mobile units specified in its application will be placed in operation not later than 8 months after the date of grant of his license for the system.

(d) Where licensees, authorized under the provisions of paragraph (c) of this section, do not load the channel or channels assigned in accordance with specified loading criteria, any (assigned channel) not so occupied shall be available for assignment to other applicants. All authorizations for conventional systems are issued subject to this condition.

(e) Any licensee, at any time its authorized conventional system is occupied to 90 percent of its specified capacity, may apply for additional channel pairs.

Assignments will be made based, first, upon the availability of frequencies for use by the licensee, and, second, based upon the showing made by the licensee of its requirements for additional channel pairs.

§ 89.803 Other criteria to be applied in assigning channels for use in conventional systems of communication.

(a) In every case, the Commission will examine a proposal to determine the requirements of the applicant in terms of the number of mobile units to be served, together with the nature of the activities the applicant is engaged in. Where the applicant shows that the channel will be loaded to 70 percent of its assigned capacity, then that channel will be made available to that applicant for its exclusive use in the area in which he proposes to operate. Where the showing made justifies the assignment of more than one channel to the applicant, then additional frequencies will be made available for his use.

(b) Where a commercial concern proposes to furnish service to either eligibles under either Part 89, 91, or 93, or to the public, using a conventional system of communication, its application will be considered on the same basis as that of an applicant for private or shared communication facilities.

(c) In loading channels, the Commission will further consider the mode of operation planned; the purposes for which the system is to be used, as noted; the persons to be served by the station and other factors. The other factors shall include the following:

(1) Mobile relay or repeater operations will not be assigned on channels to be used in two-frequency simplex mode, and conversely.

(2) Systems employing full duplex mode of operation will not be licensed on frequencies assigned for mobile relay or two-frequency simplex systems.

(3) Applicants in one service group, where possible, will not be required to share with applicants in other service groups, where the loading criteria of the services involved are different, except where circumstances require it.

(4) Push-to-talk operations will not be licensed on channels which are to be used under other modes of operation, except in those cases where it is shown that such method of operation is feasible.

(d) Conventional systems will not be authorized for radiotelephone operations.

(e) The Commission, in addition to the foregoing standards, set out at paragraph (c) of this section, may take into consideration any other factor which might enable the persons licensed to use a given channel or channels in more efficient and effective ways.

(f) No applicant shall be required to obtain any approval from a state or local regulatory authority to operate facilities authorized pursuant to these rules. State or local regulation may be exercised only to the extent that it does not limit completion or otherwise conflict with these rules. There shall be no limit on the number of systems authorized to operate in any one given area except that imposed by allocation limitations; and no person authorized to operate any radio facility under the provisions of this subpart shall have a right to protest proposals on grounds other than violation of or inconsistency with the provisions of this subpart. All grants are made subject to this condition and to the other conditions and standards set out in this subpart.

§ 89.804 Other criterion to be applied in licensing channels for use in trunked systems of communication.

There shall be no limit on the number of trunked systems authorized to operate in any one given area except that imposed by allocation limitations; and no person authorized to operate any trunked radio facility shall have a right to protest any other proposal on grounds other than violation of an inconsistency with the provisions of this subpart. All grants are made subject to the conditions and standards set out in this subpart.

PART 91—INDUSTRIAL RADIO SERVICES

8. In § 91.102(a), the table is amended to read as follows:

§ 91.102 Frequency stability.

(a) * * *

| Frequency range | Transmitter (input) power | | | |
|---|---|---|---|---|
| | Fixed and base stations | | Mobile stations | |
| | Over 300 W | 300 W or less | Over 3 W | 3 W or less |
| *Megahertz* | *Percent* | *Percent* | *Percent* | *Percent* |
| Below 25 [1] | 0.005 | 0.01 | 0.01 | 0.02 |
| 25 to 50 | .002 | .002 | .002 | .005 |
| 50 to 450 | [2] .0005 | .0005 | .0005 | .005 |
| 450 to 470 | [3] [5] .00025 | [3] [5] .00025 | .0005 | [3] .0005 |
| 470 to 512 | .00025 | .00025 | .0005 | .0005 |
| 806 to 821 | .00015 | .00015 | .00025 | .00025 |
| 851 to 866 | .00015 | .00015 | .00025 | .00025 |
| 950 to 1,427 | [4] | [4] | [4] | [4] |
| 1,427 to 1,435 | [6] .03 | [6] .03 | .03 | .03 |
| Above 1,435 | [4] | [4] | [4] | [4] |

* * * * * * *

9. In § 91.103, paragraph (a) is amended and paragraph (c) is added to read as follows:

§ 91.103 Types of emission.

(a) Except as provided in paragraphs (b) and (c) of this section, stations in these services will be authorized to use only A3 or F3 emission for radiotelephony. The authorization to use A3 or F3 emission will be construed to include the use of tone signals or signalling devices whose sole function is to establish or maintain communication between stations.

* * * * * * *

(c) Operation in the frequency bands 806 to 821 and 851 to 866 MHz is limited to F3 emission.

10. In § 91.104(b)(2), the table is amended to read as follows:

§ 91.104 Emission limitations.

* * * * * * *

(b) * * *

(2) * * *

| Frequency band (megahertz) | Authorized bandwidth (kilohertz) | Frequency deviation (kilohertz) |
|---|---|---|
| 25 to 50 | 20 | 5 |
| 50 to 150 | [1] 20 | [1] 5 |
| 150 to 450 | 20 | 5 |
| 450 to 470 | [2] 20 | [2] 5 |
| 470 to 512 | 20 | 5 |
| 806 to 821 | 20 | 5 |
| 851 to 866 | 20 | 5 |

* * * * * * *

11. In § 91.105, Paragraphs (f) and (h) are amended to read as follows:

§ 91.105 Modulation requirements.

* * * * * * *

(f) Each transmitter which is operated on a frequency in the bands 450 to 512, 806 to 821, and 851 to 866 MHz and which is provided with a modulation limiter in accordance with the provisions of paragraph (c) of this section shall also be equipped with an audio low-pass filter in accordance with the provisions of paragraph (g) or (h) of this section.

* * * * * * *

(h) For stations authorized in the 450–470 MHz band on or after November 1, 1967, and for all stations authorized in the 470 to 512, 806 to 821, and 851 to 866 MHz bands, the audio low-pass filter required by provisions of the preceding

paragraphs of this section shall be installed between the modulation limiter and the modulated stage and, at audio frequencies between 3 kHz and 20 kHz, shall have an attenuation greater than the attenuation at 1 kHz by at least: 60 $\log_{10}$ (f/3) decibels. Where "f" is the audio frequency in kHz. At audio frequencies above 20 kHz, the attenuation shall be at least 50 decibels greater than the attenuation at 1 kHz.

* * * * * * *

12. In § 91.106(b), the table is amended to read as follows:

§ 91.106 Power and antenna height.

* * * * * * *

(b) * * *

| Frequency range (megahertz) | Maximum plate power input to the final radio frequency stage (watts) | Maximum effective radiated power (watts) |
|---|---|---|
| 1.6 to 6 | 2,000 | |
| 25 to 100 | 500 | |
| 100 to 216 | 600 | |
| 216 to 220 | [1] | [1] |
| 220 to 470 | 600 | |
| 470 to 512 | | 1,000 |
| 806 to 821 | | [2] |
| 851 to 866 | [3] | [2] |
| Above 950 | [1] | [1] |

[1] To be specified in the station authorization.
[2] For power limitations see sec. 89.651.
[3] The output power of a transmitter on any authorized frequency in this service shall not exceed 250 W (24 dBw).

* * * * * * *

13. A new Section 91.116 is added to read as follows:

§ 91.116 Frequencies in 806 to 821, 851 to 866 MHz bands.

For criteria governing the use of frequencies in the 806 to 821 and 851 to 866 MHz bands see Part 89, Subpart S.

## Part 93—Land Transportation Radio Services

14. In § 93.102(a), the table is amended to read as follows:

§ 93.102 Frequency stability.

(a) * * *

| Frequency range | All fixed and base stations | All mobile stations | |
|---|---|---|---|
| | | Over 3 W | 3 W or less |
| *Megahertz* | *Percent* | *Percent* | *Percent* |
| Below 25 | 0.01 | 0.01 | 0.02 |
| 25 to 50 | .002 | .002 | .005 |
| 50 to 450 | [1] .0005 | .0005 | .005 |
| 450 to 470 | [2] [4] .00025 | .0005 | [2] .0005 |
| 470 to 512 | .00025 | .0005 | .0005 |
| 806 to 821 | .00015 | .00025 | .00025 |
| 851 to 866 | .00015 | .00025 | .00025 |
| 950 to 1,427 | [3] | [3] | [3] |
| 1,427 to 1,435 | [5] .03 | .03 | .03 |
| Above 1,435 | [3] | [3] | [3] |

* * * * * * *

15. In § 93.103, paragraph (a) is amended and paragraph (c) is added to read as follows:

§ 93.103 Types of emission.

(a) Except as provided in paragraphs (b) and (c) of this section, stations in these services will be authorized to use only A3 or F3 emission for radiotelephony. The authorization to use A3 or F3 emission will be construed to include the use of tone signals or signalling devices whose sole function is to establish and maintain communication between stations.

* * * * * * *

(c) Operation in the frequency bands 806 to 821 and 851 to 866 MHz is limited to F3 emission.

16. In § 93.104(b)(2), the table is amended to read as follows:

§ 93.104 Emission limitations.

* * * * * * *

(b) * * *

(2) * * *

| Frequency band (megahertz) | Authorized bandwidth (kilohertz) | Frequency deviation (kilohertz) |
|---|---|---|
| 25 to 50 | 20 | 5 |
| 50 to 150 | [1] 20 | [1] 5 |
| 150 to 450 | 20 | 5 |
| 470 to 512 | [2] 20 | [2] 5 |
| 806 to 821 | 20 | 5 |
| 851 to 866 | 20 | 5 |
| Above 866 | (4) | (4) |

* * * * * * *

17. In § 93.105, paragraphs (f) and (h) are amended to read as follows:

§ 93.105 Modulation requirements.

* * * * * * *

(f) Each transmitter which is operated on a frequency in the bands 450 to 512, 806 to 821, and 851 to 866 MHz and which is provided with a modulation limiter in accordance with the provisions of paragraph (c) of this section shall also be equipped with an audio low-pass filter in accordance with the provisions of paragraph (g) or (h) of this section.

* * * * * * *

(h) For stations authorized in the 450–470 MHz band on or after November 1, 1967, and for all stations authorized in the 470–512, 806 to 821, and 851 to 866 MHz bands, the audio low-pass filter required by the provisions of the preceding paragraph of this section shall be installed between the modulation limiter and the modulated stage and, at audio frequencies between 3 kHz and 20 kHz, shall have an attenuation greater than the attenuation of 1 kHz at least: $60 \log_{10} (f/3)$ decibels. Where "f" is the audio frequency in kHz. At audio frequencies above 20 kHz, the attenuation shall be at least 50 decibels greater than the attenuation at 1 kHz.

* * * * * * *

18. In § 93.106(b), the table is amended to read as follows:

§ 93.106 Power and antenna height.

* * * * * * *

(b) * * *



104-037—74——6

| Frequency range (megahertz) | Maximum plate power input to the final radio frequency stage (watts) | Maximum effective radiated power (watts) |
|---|---|---|
| 30 to 100 | 500 | |
| 100 to 470 | [1] 120 | |
| 470 to 512 | | 1,000 |
| 806 to 821 | | [4] |
| 851 to 866 | [3] | [4] |
| Above 950 | [2] | |

[1] In frequency band 450–470 MHz maximum plate power input in excess of 120 W but not in excess of 600 W may be authorized in accordance with the provision of Subpart E of this part, upon submission of the required showings.
[2] [Reserved].
[3] As specified in § 93.111.
[4] For power limitations see sec. 89.651.
[5] The output power of a transmitter on any authorized frequency in this service shall not exceed 250 W (24 dBw).

* * * * * * *

19. A new Section 93.116 is added to read as follows:

§ 93.116 Frequencies in the 806 to 821 and 851 to 866 MHz bands.

For criteria governing the use of frequencies in the 806 to 821 and 851 to 866 MHz bands see Part 89, Subpart S.

## APPENDIX C

### Guidelines Under Which Development Authorizations for Cellular Systems in the 806–947 MHz Frequency Bands Will Be Issued

#### I. ELIGIBILITY

Developmental authorizations for cellular systems in the 806–947 MHz frequency band will be issued only to existing and proposed wireline communication common carriers who are legally, financially and otherwise qualified to conduct experimentation for the development of engineering, operational data and techniques directly related to the establishment of a high capacity mobile telephone system which is based upon a cellular concept and regulated under Part 21 of the Commission's Rules.

#### II. SCOPE OF SERVICE

Developmental authorizations will be issued for development of a high capacity mobile telephone system, including provisions for mobile telephone and automatic dispatch service to be governed by Part 21 of the Rules and Regulations.

#### III. ADHERENCE TO PROGRAM OF RESEARCH AND DEVELOPMENT

The program of research and development, as stated by an applicant in the application for construction permit or license or stated in the instrument of station authorization, shall be substantially adhered to unless the licensee is otherwise authorized by the Commission.

#### IV. TERMS OF GRANT: GENERAL LIMITATIONS

a. Developmental authorizations shall normally be issued for one year or longer as the Commission may deem appropriate in any particular case, and shall be subject to cancellation without a hearing by the Commission at any time upon notice to the licensee.

b. Where some phases of the developmental program are not covered by the General Rules of the Commission or by Part 21 of the Rules, the Commission may specify supplemental or additional requirements or conditions in each case as it may deem necessary in the public interest, convenience or necessity.

c. Frequencies allocated to the service toward which such development is directed will be assigned for developmental operation on a one system per market area basis.

d. Only one developmental system will be authorized any single applicant.

e. No interference shall be caused to the regular services of stations operating in accordance with the Commission's Table of Frequency Allocations (2.106 of the Rules and Regulations).

f. All systems shall be designed for nationwide compatibility for roamer operation.

g. The rendition of communication service for hire is not permitted unless specifically authorized by the Commission.

h. The grant of a developmental authorization carries with it no assurance that the developmental program, if successful, will be authorized on a permanent basis.

V. SUPPLEMENTARY SHOWING REQUIRED

a. Authorizations for development of a cellular system will be issued only upon a showing that the applicant has a definite program of research and development, the details of which shall be set forth, having reasonable promise of substantial contribution to these services within the term of such authorization. In addition to showing that the applicant is financially qualified or that adequate provision has been made to underwrite the costs of the proposed venture, a specific showing should be made as to the factors which the applicant believes qualify him technically to conduct the research and development program, including a description of the nature and extent of engineering facilities which applicant has available for such purpose.

b. Expiring developmental authorizations may be renewed only upon the applicant's compliance with the objectives of the authorization sought to be renewed and upon a factual showing that further progress in the program of research and development requires further radio transmission and that the public interest, convenience or necessity would be served by renewal of such authorization.

VI. DEVELOPMENTAL REPORT REQUIRED

a. Upon completion of the program of research and development, or, in any event, upon the expiration of the instrument of station authorization under which such investigations were permitted, or at such times during the term of the station authorization as the Commission may deem necessary to evaluate the progress of the developmental program, the licensee shall submit, in duplicate, a comprehensive report on the following items, in the order designated:

1. Report on the various phases of the project which were investigated.
2. Total number of hours of operation on the frequencies assigned.
3. Copies of any publication on the project.
4. A listing of any patents applied for, including copies of any patents issued as a consequence of the activities carried forth under the authorization.
5. Detailed analysis of the result obtained.
6. Any other pertinent information.

b. In addition to the information required by paragraph (a) of this section, the developmental report of a station authorized for the development of a proposed radio service shall include comprehensive information on the following items:

1. Probable public support and methods of its determination.
2. Practicability of service operations.
3. Interference encountered.
4. Pertinent information relative to merits of the proposed service.
5. Propagation characteristics of frequencies used, particularly with respect to the service objective.
6. Frequencies, if any, believed to be more suitable and reasons therefore.
7. Type of signals or communications employed in the experimental work.

c. Normally, developmental reports will be made a part of the Commission's public records. However, an applicant may request that the Commission withhold from the public certain reports and associated material relative to the accomplishments achieved under developmental authorization, and, if it appears that such information should be withheld, the Commission will so direct.

FCC 74R-157

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>SAMUEL C. MCCLUNEY III, 1536 PEARL STREET, JACKSONVILLE, FLA. 32206<br>Suspension of Amateur Radio Operator License KOECG<br>and<br>Order To Show Cause Why the License for Radio Station KOECG in the Amateur Radio Service Should Not Be Revoked | Docket No. 19562 |

APPEARANCES

*Samuel C. McCluney III, Pro Se* and *Henry C. Bowen* and *Christopher De La Fleur* on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted April 24, 1974; Released May 1, 1974)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. The above-captioned proceeding was initiated by Order to show cause why the license for amateur radio station KOECG should not be revoked, and by an Order to show cause why the amateur extra radio operator's license of Mr. Samuel C. McCluney, III should not be suspended for the remainder of its term. These orders were issued by the Chief of the Safety and Special Radio Service Bureau, pursuant to delegated authority, released June 29, 1972. By Order released October 31, 1972, No. 91485, the Commission designated the above matter for consolidated hearing. A hearing was held in Jacksonville, Florida, before Administrative Law Judge Byron E. Harrison on August 13, 1973. In his Initial Decision, FCC 74D-11, released February 19, 1974, the Judge concluded that McCluney had acquired his amateur extra license by fraud and misrepresentation and that he was not qualified to be a licensee of this Commission. Accordingly, he proposed to revoke the station license and suspend McCluney's operator's license for the remainder of its term. McCluney filed a document on March 25, 1974, which challenges the propriety of the Initial Decision. While this document does not comply with the requirements of Section 1.277(a)

of the Commission's Rules,[1] we will nevertheless consider it on the merits.[2] Since neither party has requested oral argument, the decision will be considered in view of the record and pleadings in the case. The Board has carefully considered the entire record, the Initial Decision and McCluney's "exceptions" thereto and is fully satisfied that the Judge's findings of fact fairly reflect the record in this proceeding and that the conclusions reached therein are warranted by those findings. Accordingly, the Board hereby adopts the findings of fact and conclusions of the Administrative Law Judge set forth in his Initial Decision. However, in view of the peculiar circumstances in this case and Mr. McCluney's unfamiliarity with the niceties of legal proceedings and pleadings, the Review Board will discuss the matters raised by his pleading March 25, 1974.

2. McCluney's "exceptions" are somewhat less than a model of clarity. However, it appears to us that he is contending that he was deprived of a full and fair hearing because the Commission did not appoint a lawyer to represent him; that he did not know that the Commission's letter inquiries of August 4, 1971, and March 21, 1972, might become the basis for the revocation and suspension proceeding and that had he known this, his answer may have been different. Moreover, he contends that the Bureau's and the Administrative Law Judge's refusal to permit him to explore what he believes may have been irregularities in some other amateur license matters, has deprived him of a defense. He believes that by so showing he may establish the probability that there was some irregularity in the handling of his July 17, 1970 renewal application.[3] Further, he contends that the Commission's refusal to furnish him a transcript of the hearing record precluded his filing proposed findings and conclusions in this proceeding. He also argues that the Administrative Law Judge unfairly evaluated the record when he arrived at the conclusion that McCluney had obtained his extra class operator's license in the amateur radio service issued September 8, 1970 by fraud and misrepresentation.

3. In particular, he argues that in addition to the extraneous marking on the 1965 license document which he submitted with his renewal application, upon which the Bureau and the Administrative Law Judge relied, there is also a large blue ink "X" on the back of the document, which, while acknowledged by the Law Judge, was regarded by him as irrelevant to the proceeding. McCluney also contends that the Judge's

[1] Section 1.277(a) reads as follows:
"Each exception to an initial decision or to any part of the record or proceeding in any case, including rulings upon motions or objections, shall point out with particularity alleged errors in the decision or ruling and shall contain specific references to the page or pages of the transcript of hearing, exhibit, or order if any on which the exception is based. Any objection not saved by exception filed pursuant to this section is waived. The exceptions should be concise and they will not be accepted if they contain argumentative matters or discussion of law. Lengthy excerpts of testimony, when desired, shall not be contained in the exceptions but shall be set forth in an appendix."

[2] The Bureau, in its opposition to McCluney's "exceptions", points out that the document was filed four days late and that it does not set forth with particularity and with references to the transcript of record the applicant's exceptions to the Initial Decision. Since McCluney requested instructions as to how to appeal from the Initial Decision within two weeks of its release and since his written document was filed within three weeks of the Bureau's response, it will be regarded as timely. Moreover, since McCluney has not had the benefit of counsel, the Board will endeavor to understand and fully consider his objections to the Initial Decision.

[3] There is no indication in this record what irregularities McCluney had in mind or how they may be related to the instant case.

analysis in paragraph 1 of his conclusions concerning McCluney's theories of defense is not warranted because the copies of the Bureau's exhibits, which were submitted to him prior to the hearing did not show the color of the various markings on the license document. Therefore, McCluney argues, he could not have advised the Bureau or the Judge that he did not mark "amateur extra" in black ball point pen ink on that document prior to the hearing, since he first saw the original license at that time. Finally, he contends that he did not receive an amateur extra class operator's license in 1965, but that he subsequently took and passed the necessary examinations and the amateur extra class operator's license was then issued to him.

4. The Review Board has carefully studied the entire record in this proceeding and it is very clear that before the beginning of the hearing the applicant who made no showing that he was unable to pay for a lawyer, other than a declaration that he was very poor, was fully advised that the Commission would not be able to provide counsel for him. It was suggested that he consult his local Legal Aid Society. At the time the hearing commenced, the Administrative Law Judge and Bureau counsel went to great lengths to explain to Mr. McCluney what his rights and privileges were and to be certain that his rights and interests were fully protected at each stage of the proceeding. Moreover, McCluney did obtain at least one extension of the filing date for proposed findings of fact and conclusions on the ground that he hoped to get assistance from a local legal aid bureau. His contention that the Commission did not make available a transcript of the hearing proceedings is not founded in the record of the proceeding. The Administrative Law Judge, by Order FCC 73M–1247, released October 31, 1973, directed that a copy of the transcript of the hearing be made available to McCluney for inspection at the office of the Social Security Administration, 2809 Art Museum Drive, Jacksonville, Florida for a period of six months from that date. In the same Order the Judge continued the date for filing corrections to the transcript from October 19, 1973 to November 16, 1973; proposed findings and conclusions, from October 19, 1973 to November 23, 1973; and reply findings from November 9, 1973 to December 7, 1973. McCluney's contention, that since he lives in Gainesville the depositing of the transcript in Jacksonville effectively precluded him from using the record, is unwarranted.[4] Thus, if McCluney wished to do so, he had full opportunity to consult the record and to file proposed findings and conclusions as directed by the Administrative Law Judge.[5]

5. The conclusions of the Administrative Law Judge concerning the merits of this matter are fully and carefully documented by findings of fact adequately supported by the record in this proceeding and will not be discussed at any great length by the Review Board. However, it is pertinent to note that in a recent case where the question of the prior existence of an FCC license was critical to the revocation of a then-outstanding amateur extra class authorization, the Board noted that

[4] The Board takes official notice that Jacksonville is approximately 63 miles from Gainesville. In our view the travel required does not constitute an undue hardship.

[5] The Judge directed McCluney to file proposed findings, but did not prevent him from further participation in the proceeding for failure to comply with that direction as he might have done pursuant to Section 1.263(c) of the Rules.

the absence of any official Commission records of the issuance of the contested license is evidence that such a license was not in fact issued. See *Herbert L. Rippe*, 44 FCC 2d 91, 28 RR 2d 1625 (1973). That principle is even more applicable in this case where it is well established that there were at least three readily available methods for cross-checking the issuance of such a license and that upon a careful search of each of these records, there was no evidence that such a license had ever been issued to McCluney. Moreover, it was clearly established that had McCluney taken the amateur extra class examination in the spring of 1966 or 1967, the license document evidencing the successful conclusion of such examination would bear a termination date of 1971 or 1972, five years from the date of issuance shortly after the examination was passed, rather than the 1970 termination date which appeared on the license document. In view of these facts, there is no doubt that such a license was not issued by this Commission. *Herbert L. Rippe, supra.* Moreover, we fully agree with the Administrative Law Judge that no matter who altered the license document submitted with McCluney's renewal application, it was McCluney's intent and purpose to convince the Commission that he was in fact a properly authorized extra class amateur operator. This is clearly evidenced by his responses to the Commission's inquiries of August 4, 1971, and March 21, 1972, and by his testimony under oath that although he cannot remember where or precisely when, he did take and pass an amateur extra class examination. In sum, the Administrative Law Judge's Initial Decision is fully warranted by his findings of fact and by the record in this proceeding and will therefore be affirmed.

6. Accordingly, IT IS ORDERED, That the amateur radio station license for Station KOECG IS REVOKED and the amateur radio operator's license issued to Samuel C. McCluney, III IS SUSPENDED for the remainder of the term.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK, *Member, Review Board.*

FCC 74D-11

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>SAMUEL C. MCCLUNEY III, 1536 PEARL STREET, JACKSONVILLE, FLA. 32206<br>Suspension of Amateur Radio Operator License KOECG<br>and<br>Order To Show Cause Why The License for Radio Station KOECG in the Amateur Radio Service Should Not Be Revoked | Docket No. 19562 |

APPEARANCES

*Samuel C. McCluney, III, pro se;* and *Henry C. Bowen* and *Christopher De La Fleur* on behalf of The Chief, Safety and Special Services Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

(Issued February 13, 1974; Released February 19, 1974)

PRELIMINARY STATEMENT

1. By Order released June 29, 1972, the Commission [1] directed Samuel C. McCluney, III [2] (McCluney or Respondent) to show cause why the license for radio station KOECG in the Amateur Radio Service should not be revoked. By Order released on June 29, 1972 (Mimeo No. 86133), the Commission [1] suspended, for the remainder of the license term, the Extra Class Amateur Operator license of Mr. McCluney.

2. By Order released on October 31, 1972, the Commission [3] consolidated the proceedings for resolution of the following issues:

(*a*) To determine whether respondent committed violations of Sections 97.19 and 97.129 of the Commission's Rules;

(*b*) To determine whether respondent's actions as described in the Order of Suspension are contrary to the public interest, convenience and necessity and contrary to the provisions of sections 301 and 307(a) of the Communications Act of 1934; as amended;

(*c*) To determine whether respondent has misrepresented or concealed material facts or was lacking in candor in that;

[1] Issued by the Chief, Safety and Special Services Bureau pursuant to delegated authority.
[2] In some documents Mr. McCluney uses his middle name, Copp, instead of the initial.
[3] See footnote 1, *supra.*

(1) respondent represented by his application filed August 20, 1970, that he had been issued an Amateur Extra Class radio station and operator's license on August 31, 1965; and

(2) respondent in his letters to the Commission dated September 3, 1971 and April 20, 1972, stated that he had taken his Amateur Extra Class examination in 1966 or 1967;

(*d*) To determine, in view of the foregoing, whether the Commission would be warranted in refusing to grant an application filed by respondent for an Amateur radio station license if the original application were now before it; and

(*e*) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the Order of Suspension should be affirmed, modified or revoked.

3. The prehearing conference and the hearing were held at Jacksonville, Florida on August 13, 1973. Mr. McCluney appeared *pro se* on that date and testified under oath. The record was closed on the same date. Prior to the actual hearing, several continuances were granted in order to consolidate this hearing with three other field hearings in Florida. Proposed findings were filed by the Safety and Special Radio Services Bureau (Bureau) on November 23, 1973—the required filing date. Mr. McCluney did not file proposed findings, although he was ordered to do so. However, since Mr. McCluney was representing himself, he was afforded the right to file reply findings, which he did file on December 10, 1973.[4]

4. This case presents a relatively simple factual question which is to determine if Mr. McCluney fulfilled the requirements for an Extra Class Amateur Radio Operators License. The Bureau takes the position that Mr. McCluney obtained such license by fraud or misrepresentation. Mr. McCluney maintains he holds this class of amateur license because he had complied with all prerequisite Commission requirements. The facts underlying this central issue are determinative of all issues in this proceeding.

## FINDINGS OF FACT

5. The respondent, Mr. McCluney, is the licensee of radio station KOECG in the Amateur Radio Service. Mr. McCluney now resides at 1128 Northwest 4th Avenue, Gainesville, Florida. He has held a license for the station since 1960, and is an active operator. This Commission issued to Mr. McCluney on September 8, 1970 an Extra Class operator license in the Amateur Radio Service. Events both before and after issuing the Amateur Radio license will cover periods between 1965 and 1971 which are divided into matters shown in Commission files and Mr. McCluney's statements on the sequence of events.

6. From the Bureau standpoint, Mr. McCluney's qualifications to hold an Extra Class operator license were first questioned in August, 1971 when it sent a letter to Mr. McCluney directing him to provide the date and time of his initial application for an Amateur Extra

[4] Throughout this record, Mr. McCluney has permitted various procedural dates to pass without action on his part. Leniency was afforded in all such matters in order to dispose of this case on the merits.

Class authorization. Mr. McCluney responded by letter of September 3, 1971 to the effect that he just could not remember when he took the examination but he thought it was in the Spring—probably April or May 1966—but, it could have been 1967. He had no knowledge of the city in which he took the examination. There followed a detailed examination of the Bureau's files.

7. Mr. Richard C. Zeigler has been employed by the Federal Communications Commission for 12 years. He is the Chief, Gettysburg Processing Section, Amateur and Citizen's Division of the Bureau. His offices are in Gettysburg, Pennsylvania. Prior to Mr. Zeigler's supervisory position, his duties, among other matters, included processing of Amateur applications. During the critical period in this case—1966 and 1967—Mr. Zeigler held the supervisory position he now holds.

8. Mr. Zeigler supervises from 23 to 26 employees, issues working instructions and is in daily contact with the work flow. He divides his time about equally between the Amateur and Citizens Radio Services. Mr. Zeigler has extensive knowledge on the processing of applications and, with reference to the Amateur Radio Service, continues to review applications which present some special problem. Mr. Zeigler testified in this proceeding and qualified both as an expert in the processing of Amateur Radio applications and the custodian of Bureau's records for the service.

9. There are six classes of Amateur operator licenses:

| | |
|---|---|
| Extra | Conditional |
| Advanced | Technician |
| General | Novice |

The highest class license is Extra and this classification entitles the operator to use additional frequencies as well as afford a prestige standing among other Amateur operators. In order for an Amateur General Class to upgrade his operator privileges to Extra Class, he must take an examination at a Commission field office. Such examination is always required unless the operator was licensed before 1917 [5] and he is now a General Class operator.

10. In order to take the Extra Class operator examination at a Commission field office, during 1966 or 1967, an application must first be submitted on FCC Form 610 to the Gettysburg office of the Bureau, with the required filing fee. If the application is in order, the applicant would receive by mail an appointment for the time and place of the required examination at a field office near the applicant. The examination is in two parts (code and theory) and should he fail the code part, the applicant would be immediately notified and he could not take the second part. If the applicant passes the examination, the field office will forward the necessary documents to the Gettysburg, Pennsylvania office for further processing. If the application is still in order for a grant, it is either passed to a key punch section, or, in some cases where the application is not completely legible red ink or pencil clarifications are used to assist the key punch operator. Mr. Zeigler states that use of red ink or pencil is standard operating procedure and there have been no exceptions. Mr. Zeigler does recognize

[5] This exception is not available to Mr. McCluney as his birthday is October 27, 1939.

that the employees in his section could have writing instruments of other colors.

11. Processing also includes placing a date stamp on the application, and, still assuming all is in order, the key punch card is then sent to Washington and placed in the computer, which issues the operator license. The computer is programmed to issue the new license, where the class of operator is changed, for a full five-year period regardless of the expiration date on the prior license. If for any reason the application is found defective, a form letter is sent to the applicant and a record of such rejections is retained for one year.

12. Internal record keeping of the Commission since 1964, when computer processing began, include three types of records which are: (a) master lists, (b) cumulative lists, and (c) the individual transaction lists. The master list contains all listings of active Amateur Radio licensees which includes the call sign, licensee's name and address, a history file number, class of operator privileges, process date and the issue and expiration date. This list is printed twice a year and has been on microfilm since 1967. The cumulative list shows all changes in operator licenses over a given period of time. For example, the list could cover June through August and this list differs from the master list in that not all amateur operators are listed, but, only those involving changes. A typical change could be an amateur operator who has passed an examination to upgrade his license. The individual transaction list shows applications processed by the computer on a day-to-day basis. Normally the individual list is produced twice a week.

13. Based on Mr. Zeigler's knowledge of the application processing and the normal records of his office, a search was made of the three types of records listed in paragraph 12 above, together with what he believed to be the actual as-filed applications of Mr. McCluney, which are also retained in the files. Mr. Zeigler's review of the master list records for the years 1965 through 1970 showed the following concerning Mr. McCluney's licensing in the Amateur Radio Service:

(*a*) As of March 1965, Mr. McCluney held the call sign KOECG; lived at 37 Kingsberry, St. Louis, Missouri; was Technical Class operator; the issue date of the license was September 12, 1960; and the expiration date of the license was September 12, 1965;

(*b*) As of October 1965, Mr. McCluney held the same call sign; lived at 418 Olive Street, St. Louis, Missouri, was a General Class operator; the issue date of that license was August 31, 1965; and the expiration date of the license was August 31, 1970;

(*c*) All master lists produced in 1966 and in 1967 showed precisely the same information as the list dated October 1965;

(*d*) As of July 5, 1968, and June 5, 1970, Mr. McCluney was still a General Class operator; the issue date of the license was August 31, 1965; and the expiration date of the license was August 31, 1970; and

(*e*) As of January 8, 1971, Mr. McCluney was listed as an Amateur Extra Class operator; the issue date of the license was September 8, 1970; and the expiration date of the license was September 8, 1975.

14. The cumulative lists for the years 1965 through and including 1970 revealed the following:

(*a*) The original cumulative list covered the period between September 5, 1964, and February 11, 1965, and contained no KOECG information (meaning no changes were made in the records for this call sign during that time);

(*b*) The cumulative list covering the period between February 11, 1965, and September 8, 1965, reflects the following changes for Mr. MrCluney's Amateur

license: new address of 418 Olive Street, St. Louis, Missouri; change from Technician Class to General Class operating privileges; the issue date of the license was now August 31, 1965; and the expiration date of the license was August 31, 1970;

(c) Nothing further for the call sign KOECG was in cumulative lists until September 1970, which revealed that Mr. McCluney lived at 418 Olive Street, St. Louis, Missouri; held the call sign KOECG; was an Extra Class operator; the issue date of the license was September 8, 1970; and the expiration date of the license was September 8, 1975.

Mr. Zeigler stated that if Mr. McCluney had received Extra Class privileges in 1966 or 1967, this fact would have been reflected in the cumulative lists for those years.

15. The individual transaction lists covering the years 1965 through and including 1970 revealed the following information about Mr. McCluney:

(a) As of August 31, 1965, Mr. McCluney was issued a license as a General Class operator for Amateur radio station KOECG; the issue date of the license was August 31, 1965; and the expiration date of the license was August 31, 1970;

(b) There were no transactions under the call sign KOECG in 1966;

(c) The September 16, 1967 and November 14, 1967, transaction lists show that a duplicate license document (For Mr. McCluney's General Class operators license for KOECG issued August 31, 1965) was issued to Mr. McCluney on each of those dates;

(d) There were no transactions for the call sign KOECG in 1968 and 1969; and

(e) The transaction list of September 18, 1970, revealed the following changes in Mr. McCluney's Amateur license; change from General Class to Extra Class operator privileges for Amateur radio station KOECG and the issue date was now September 8, 1970, and the expiration date was now September 8, 1975.

Mr. Zeigler stated that if Mr. McCluney had received his Extra Class operator privileges in 1966 or 1967, this fact would have been reflected in the individual transaction lists covering those years. In summary, Mr. Zeigler made a detailed search of all three sets of records kept in the usual operation of his Section and there appeared no record that Mr. McCluney had taken the Extra Class operator examination in 1966 or 1967 or any other time during the periods covered by the records.

16. In 1965, a renewal application (FCC Form 610) signed by Mr. McCluney and dated August 17, 1965, was filed with the Commission on August 20, 1965. Attached to that application was a copy of a license document (FCC Form 660) which on its face reflected that Mr. McCluney was a General Class operator. The issue date on that copy of the licensed document was September 12, 1960, and the expiration date was September 12, 1965. The September 12, 1965 expiration date on the license document[6] meant that the license would have expired at that time and would have been due for renewal. On the application itself, the "renew license" box under the section "Actions Requested" was checked by the Respondent. This application was granted and Mr. McCluney's license was renewed to August 31, 1970.

17. In 1970, a renewal application (FCC Form 610) signed by Mr. McCluney, dated July 17, 1970, was mailed to the Commission and filed August 20, 1970. Attached to that application was a copy of a license document (FCC Form 660) which on its face reflected that Mr. Mc-

[6] License in the context of this proceeding includes both the station call sign and the operator privileges.

Cluney was an Extra Class operator.[7] The issue date on that license was August 31, 1965, and the expiration date August 31, 1970. The expiration date of August 31, 1970, on this license meant that the license would have expired at that time and would have been due for renewal. On the application itself, Box G under question 5 was checked (renewal of present license). Mr. Zeigler had present at the hearing originals of the pertinent application documents which based on his knowledge of the files were the documents as filed with the Commission and which are in evidence in this proceeding. With respect to the McCluney license renewal application filed August 20, 1970, Mr. Zeigler explained all red ink or pencil processing notations on this application. The only matters he could not explain were the presence of a large "x" in blue ink on the reverse side of the application form that had bled through to the other side of the page and had been partly obliterated by what appears to be typewriter correction fluid and a notation on the copy of the Radio License (FCC Form 660) attached to Mr. McCluney's renewal application which shows after "Operator Privileges" the hand printed words in black ballpoint pen "AMATEUR EXTRA". While the presence of the "x" is not explained, it is of no decisional significance in the case. Otherwise the only unexplained entry on the McCluney 1970 license application is the entry "AMATEUR EXTRA".

18. It was Mr. Zeigler's opinion that, based on his knowledge of office procedures, Mr. McCluney's application as filed August 20, 1970 was, except for explained processing notations and the "x", the original application as filed by Mr. McCluney. Mr. Zeigler also stated, based on his experience, that if Mr. McCluney had successfully passed the examination to upgrade his license from General to Extra Class in 1966 or 1967 a new license document would have been issued that would have an expiration date exactly five years after the date stamp the processing unit would place on the application, which would be some date in 1971 or 1972. Clearly, Mr. McCluney's prior renewal of license application filed August 20, 1965 was for "General" operator privileges and the files show no upgrading of such privileges since that date.[8]

19. Mr. McCluney states with reference to the 1970 license renewal application that ". . . I didn't write in black ink Amateur Extra up there. I didn't write, well, this KOECG and circle it in red on there." Mr. McCluney was questioned both before and during the hearing as to the date and place he took the Amateur Extra examination. His letters to the Bureau Chief concerning this are in evidence. On September 5, 1971 he stated in part "As I recall this [Extra Class Examination] was about five or six years ago. The only thing I seem to remember is that it was in the Spring. Probably around April or May of 1966 or 1967. Even then I can't tell you what office it was in." On April 20, 1972, Mr. McCluney again responded to a Bureau letter on the same subject. In part, he stated "As I have already stated. . . . I took the exam in '66 or '67 but I don't remember where."

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[7] The designation "AMATEUR EXTRA" is hand printed in black capital letters rather than typewritten entries as on the remainder of the form.

[8] Section 97.129 of the Commission's Rules states, in part, that a licensed operator shall not obtain or attempt to obtain an operator license by fraudulent means.

20. During cross-examination at the hearing, Mr. McCluney was again asked when he took the examination which qualified him for Amateur Extra Class operator privileges. His response was no more specific than his letters. He did state that he could have taken the examination in Baltimore because he knew the Commission had a field office there, but, he really did not know if he had taken the examination in Baltimore.

21. Mr. McCluney testified that he did not recall requesting a duplicate license, as shown in Commission records, on September 16, 1967, and again on November 14, 1967. He presumed he may have lost his original license document issued on August 31, 1965, but, he could not recall. Mr. McCluney could not recall requesting the second duplicate license on November 14, 1967, and suggested that perhaps the Commission made an error in sending it. He lost all of his original license documents issued to him by the Commission, at one time or another by moving around.[9] He presumes he had an original when he applied for renewal on July 17, 1970. Mr. McCluney did not submit the original license issued in August of 1965, but he did submit a copy of that license with the Form 610 submitted in July of 1970. He had no explanation as to why the copy of the license document submitted in July of 1970 was not marked duplicate. Mr. McCluney states he had on another occasion lost a duplicate license and subsequently found the original license document and assumes that is what happened in 1970.

22. Mr. McCluney's primary defense is that the Commission made an error, and, that someone other than himself altered his 1970 license renewal application by inserting in ballpoint pen "AMATEUR EXTRA".[10] Mr. McCluney also insists that when he signed and filed his renewal of license application on July 17, 1970, he was an Amateur Extra Class operator.

CONCLUSIONS

1. The primary issue in this proceeding is a determination of how and when Mr. McCluney received his Amateur Extra Class operator privileges, if indeed he ever received such privileges. The Commission did accept and grant Mr. McCluney's license renewal application based on the representation in that application that Mr. McCluney was entitled to Amateur Extra Class operator privileges. Mr. McCluney appeared and testified in this proceeding and it was abundantly clear that he was evasive in his responses, provided vague and unsupported information which was impossible to test through any independent means and offered excuses which are beyond all reasonable human belief.[11] Basically, Mr. McCluney has two theories of defense, which appear inconsistent. First, Mr. McCluney states he did not submit his

[9] Mr. McCluney indicated he did move around quite a bit between late 1965 and the latter part of 1968 while he was in the Army. He recalls being stationed at Ft. Leonard Wood, Missouri, in late 1965; in Indianapolis, Indiana, in 1966; and in Brooklyn, New York. Aberdeen Proving Grounds, Maryland and outside Watertown, New York, in 1967. Mr. McCluney was an active amateur radio operator while in the Army with his frequency of operation varying from once every two weeks to every day.

[10] The Commission's computer was reprogrammed subsequent to August 1970 to reject any application which appeared to contain changed or altered entries.

[11] Mr. McCluney's memory appeared highly selective. He could recall the location and time period at each of his Army posts. He could also recall the number of times in a week or month he used his amateur radio facilities. He could not recall anything concerning the AMATEUR EXTRA examination except he was entitled to Extra operator privileges and he had lost all papers which may have proved or disproved his version of events.

1970 renewal of license application with the words "AMATEUR EXTRA" inserted in black ballpoint pen. If this is true, then he could have advised the Commission both before and during the hearing, either voluntarily or in response to specific letter requests that the application must have been altered by someone unknown to him after it arrived at the Commission, that he had never taken the Amateur Extra Class examination and that his renewal license should be issued for the General Class. Next he states that he did take the examination in 1966 or 1967 at some undisclosed place and he is entitled to a license specifying the Amateur Extra Class privileges. From this a clear implication can be made that whoever placed Amateur Extra on the 1970 application, Mr. McCluney fully intended to make this representation to the Commission and that he intended the Commission would renew the license pursuant to the application request, which is in fact what happened. When these two theories are combined, a hopeless inconsistent picture is presented. Either Mr. McCluney did or did not have the Amateur Extra privileges, but it cannot be both ways. However, the one consistent part of Mr. McCluney's testimony, for which there is no support, is that he did take the examination in 1966 or 1967 at some unknown location and is entitled to the Amateur Extra rating. This version is rejected and it must be concluded that Mr. McCluney did file his 1970 license renewal application fully intending that the renewal be issued with the Amateur Extra classification. It must also be concluded that he did not take the required examination and he thereby conducted a fraudulent scheme to renew his amateur radio station license for station KOECG and upgrade his operator's privileges without taking and passing the required Extra Class operator examination. This scheme was placed in motion when he filed a 1970 license renewal application which contained an altered document. With this the fraudulent scheme was complete regardless of Commission action which temporarily, at least, gave him the benefits of the fraud. The fact that Commission application processing at that time did not question an altered document, in no way alters Mr. McCluney's culpability. Any theory that the entry of Extra Class after the application was filed is rejected as Mr. McCluney has continuously insisted he did take the examination and he is entitled to Extra Class privileges.

2. Mr. Zeigler demonstrated his knowledge of processing such applications, which he supervises, and his knowledge of records on actions taken by the Commission. He presented at the hearing a complete analysis of the processing and record keeping, including the original, as-filed, application of Mr. McCluney. The record keeping process is so interconnected that even assuming the occasional error, which Mr. Zeigler admits, it would be difficult for all records to reflect the same history, i.e., Mr. McCluney did not take the Amateur Extra examination. Mr. Zeigler is the custodian of records kept in the usual operations of his Section and he would have no reason to present any matter other than what the records show. It must be concluded that Mr. McCluney willfully violated Sections 97.19 and 97.129 of the Commission's Rules.

3. There remains for consideration the ultimate question as to whether Mr. McCluney's Amateur radio station license should be revoked and his Amateur radio operator license be suspended. Mr. Mc-

Cluney has continually insisted that he has met the requirements for Amateur Extra Class operator privileges. Numerous opportunities were afforded to Mr. McCluney to provide any facts which may lend some credence to his theories. No such facts were provided and it is concluded that the Commission's files show the correct history with respect to Respondent's license and that Mr. McCluney obtained enhanced operator privileges through a fraudulent scheme. This Commission is entitled to complete, responsive, truthful and candid information from its licensees. There are no facts in this record to indicate that Mr. McCluney's future conduct would be any different than the past performance. The Commission has continually cautioned its licensees that the integrity of its system of regulation depends on complete honesty and candor in filing applications and responding to inquiries. It has repeatedly explained that it cannot condone false or misleading statements by licensees. Having concluded that Respondent deliberately misled and deceived the Commission in his renewal of license application dated July 17, 1970 and filed August 20, 1970 and further that he has continued such deception in letters to the Commission dated September 3, 1971 and April 20, 1972 and throughout the hearing, it is also concluded that he has failed to show cause why license should not be revoked.

4. Accordingly, IT IS ORDERED that, unless an appeal to the Commission from this Initial Decision is taken by any of the parties, or the Commission reviews the Initial Decision on its own merits in accordance with the provisions of Section 1.276 of the Rules, the license for Amateur Radio Station KOECG and the Amateur Radio Operator License KOECG both issued to Samuel C. McCluney, III, ARE HEREBY, respectively REVOKED AND SUSPENDED, effective five (5) days following the release of a final decision or Order herein.

FEDERAL COMMUNICATIONS COMMISSION,
BYRON E. HARRISON, *Administrative Law Judge.*

FCC 74R–166

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re<br>MEADVILLE MASTER ANTENNA, INC., MEADVILLE, PA.<br>Request for Waiver of Section 74.1103 of the Commission's Rules | Docket No. 19479<br>File No. SR–76177 |

ORDER

(Adopted May 6, 1974; Released May 6, 1974)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the Initial Decision herein, the exceptions and briefs, and the request for oral argument, filed with respect thereto;

2. IT IS ORDERED, That oral argument before a panel of the Review Board IS SCHEDULED for May 23, 1974, commencing at 10:00 a.m., in Room 650, 1919 M Street, N.W., Washington, D.C.; that the parties who within five days after release of this Order file written notice of intention to participate in oral argument (Section 1.277(c) of the Rules) shall each be allowed 20 minutes for argument; that counsel for Meadville Master Antenna, Inc. may reserve part of his time for rebuttal; and that the order of appearance shall be:

Meadville Master Antenna, Inc.
Great Lakes Communications, Inc. (WICU–TV)
Cable Television Bureau

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*



104–037—74——7

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
METROPOLITAN PITTSBURGH PUBLIC BROADCASTING, INC.
For Waiver of Section 73.503(d) of the Rules Concerning Station WQED–FM, Pittsburgh, Pa.

DECEMBER 26, 1973.

METROPOLITAN PITTSBURGH PUBLIC BROADCASTING, INC.,
*Licensee of Station WQED–FM,*
*4802 Fifth Avenue,*
*Pittsburgh, Pa. 15213.*

GENTLEMEN: This is in reply to your letter of May 29, 1973, as supplemented by a letter dated July 30, 1973, requesting a waiver of Section 73.503(d) of the Commission's Rules.

Section 73.503(d) of the Commission's Rules, pertaining to educational FM broadcast stations, states in part: "Each licensee shall furnish a nonprofit and noncommercial broadcast service . . . (N)o announcements promoting the sale of a product or service shall be broadcast in connection with any program."

You seek a waiver of that rule to permit, over a period of one year, the presentation of a weekly series of half-hour "oldtime" radio programs, including commercials, that were originally broadcast prior to 1943. You state that such commercials are "an integral part of the nostalgic appeal of the programs," and that a grant of the waiver would serve the public interest.

The broadcast of commercials associated with "oldtime" radio programs clearly serves legitimate historical interests. On the other hand, such commercials conflict with the policy expressed in Section 73.503(d) of the Commission's Rules that you provide a noncommercial broadcast service and with the specific prohibition of announcements promoting the sale of a product or service. Commercials for products or services still on the market obviously promote the sale of those products and services. The Commission believes that the waiver request you propose strikes an appropriate balance between the historical interests and the Commission's concern that educational stations retain their noncommercial nature. Accordingly, Section 73.503(d) is waived for one year from the date of this letter, to permit the broadcast of a once-per-week, half-hour "oldtime" radio program, along with associated commercials. Similar requests for waiver of the rule up to a total of 26 hours per year will also be entertained.

You may, of course, broadcast other "oldtime" radio series if the commercials are deleted. In addition, as you are aware, Section 1335

of Title 15 of the United States Code prohibits the advertising of cigarettes on radio and television. The Commission has no authority to waive the provisions of that statute when acting on waivers of Section 73.503(d) of its Rules.

Sincerely yours,

WALLACE E. JOHNSON,
*Chief, Broadcast Bureau.*

FCC 74-385

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Application of<br>RADIO NEW JERSEY, HACKETTSTOWN, N.J.<br>For Construction Permit | Docket No. 18252<br>File No. BP-16987 |

DECISION

(Adopted April 16, 1974; Released April 30, 1974)

COMMISSIONER REID FOR THE COMMISSION:

1. This proceeding involves the application of Radio New Jersey (RNJ) for a construction permit for a new standard broadcast station at Hackettstown, New Jersey. By order released July 22, 1968, 13 FCC 2d 952, we designated for consolidated hearing seven applications for standard broadcast stations, including those of RNJ and Lake-River Broadcasting Corp. (Lake-River).[1] The designated issues included inquiries into possible misrepresentations or lack of candor by RNJ/Lake-River principals in submissions to the Commission.

2. Of the seven original applications consolidated for hearing, all except that of RNJ have been granted or dismissed. Thus the only question remaining is whether RNJ possesses the basic qualifications to be a licensee. In an Initial Decision, 44 FCC 2d 60, Administrative Law Judge (ALJ) French resolved the outstanding issues in favor of RNJ/Lake-River and proposed grant of RNJ's application. The Broadcast Bureau filed exceptions to the Initial Decision with the Review Board. In its Decision, 44 FCC 2d 51, released December 11, 1973, the Board affirmed the Initial Decision, concluding that while principals of RNJ/Lake-River had been careless in their representations in several important respects, there was no substantial evidence of deliberate misrepresentation. No application for review of the Board's Decision was filed. However, in a Memorandum Opinion and Order, FCC 74-45, released January 21, 1974 (Commissioner Hooks dissenting), we stated that certain findings and conclusions of the Review Board regarding three instances of alleged misrepresentation on the part of RNJ/Lake-River principals apparently were contradicted by the record, and it appeared that substantial questions remained as to the effect of allegations of misrepresentation and lack of candor on the qualifications of RNJ. Accordingly, we ordered review

[1] Originally RNJ filed applications for stations at both Lakewood, New Jersey, and Hackettstown, New Jersey. On January 9, 1968 RNJ filed an amendment changing its name on the Lakewood application to Lake-River Broadcasting Corp. We consolidated both applications for hearing, together with several other applications which were mutually exclusive as to either RNJ or Lake-River, because a candor issue had been raised against Lawrence Tighe, Jr. and Robert Boughrum, who were principals of both RNJ and Lake-River. The Lake-River application was subsequently dismissed, but events connected with the applicant remain pertinent here.

of the Board's decision *sua sponte*. RNJ and the Broadcast Bureau participated in oral argument held on March 28, 1974.

3. Having carefully considered the evidence and the arguments of RNJ and the Broadcast Bureau, we conclude the result reached by the Review Board was proper. However, since the ALJ stated no conclusions specifically addressed to the particular matters with which we are now concerned and since it seems to us the Board's resolution of these matters was overly facile, we shall set forth here our own findings and conclusions with regard to them.

4. One of the alleged instances of misrepresentation arose out of a dispute concerning the original availability of the site specified in RNJ's Hackettstown application. RNJ claimed it had an oral option to lease the property from Mrs. Sheldon, owner of the site. In order to ascertain whether RNJ had in fact secured an option on the Sheldon site, Louis Vander Plate, a competing applicant, induced his local attorney, Samuel Kaplan, to visit Mrs. Sheldon in May, 1966. Posing as an investor, Kaplan obtained a 90-day written option to purchase the site. Mrs. Sheldon did not at that time inform RNJ of the transaction. Kaplan visited Mrs. Sheldon again in July, 1966 and obtained an extension of the option. Vander Plate himself also visited Mrs. Sheldon, either during the summer or in early November, 1966. Subsequently, according to the findings of the ALJ and the Board, Vander Plate and Philip Baker, his communications counsel, visited Mrs. Sheldon on November 15, 1966. At this time she learned of Vander Plate's scheme. Mrs. Sheldon then called Lawrence Tighe, Jr. (a principal of RNJ) and, as the Board found, "informed him of all that had transpired" between her and Vander Plate and his agents. RNJ then contracted to purchase the site and by an amendment filed January 4, 1967, notified the Commission the oral option to lease had been changed to an agreement to buy. On February 21, 1967, Vander Plate filed a petition to dismiss RNJ's Hackettstown application, or alternatively to designate misrepresentation and site availability issues against RNJ, on the grounds that RNJ had represented the Sheldon site was available when in fact it was not. The petition alleged Vander Plate visited Mrs. Sheldon in the summer of 1966 and learned that she had optioned the site to Kaplan. It further alleged that Vander Plate again visited Mrs. Sheldon in November of 1966 and was informed by Mrs. Sheldon that, although Radio New Jersey was still treating her land as the proposed transmitter site, she was allowing this to be done simply as an accommodation to them in connection with their application at Hackettstown.

5. In its opposition to the Vander Plate petition, RNJ conceded Mrs. Sheldon had given an option to Kaplan but asserted it had been unaware of this fact, and in good faith had believed the Sheldon site was available. RNJ urged denial of the petition, asserting that the petition was "predicated upon erroneous statements of fact and law." The RNJ opposition also asserted that "as set forth in Mrs. Sheldon's affidavit and contrary to Petitioner's claims, Mr. Vander Plate visited Mrs. Sheldon only once and that was in the summer of 1966." Submitted with RNJ's opposition was an affidavit of March 8, 1967, signed by Mrs. Sheldon which, *inter alia*, denied Vander Plate had visited

her in November 1966. A verification of RNJ's opposition signed by Tighe was appended to the opposition.

6. At the hearing Mrs. Sheldon did recall a visit in November 1966 by Vander Plate. She testified her previous denial of Vander Plate's November visit resulted from the fact that the day of the visit had been so unseasonably warm that after Vander Plate left she turned on the air conditioner. Her recollection of this fact had led her to believe the visit must have occurred in the summer. Mrs. Sheldon further testified the affidavit she signed in March 1967 denying that Vander Plate had seen her in November had not been drafted by her. Rather, Tighe had come to her house and had shown her Vander Plate's petition and the prepared affidavit, which she then took to a notary and signed. The affidavit which Mrs. Sheldon signed had been drafted by RNJ's counsel, based on information supplied by Tighe. The important question is whether when Tighe submitted the affidavit he knew Vander Plate had in fact met with Mrs. Sheldon in November. As RNJ has pointed out, Tighe's only source of information at that time as to Vander Plate's meetings with Mrs. Sheldon was Mrs. Sheldon herself. If Mrs. Sheldon misinformed Tighe, then Tighe's procurement and submission of the affidavit was merely an innocent submission of an inaccurate statement. The evidence shows that shortly after the meeting with Vander Plate occurred Mrs. Sheldon called Tighe and told him she had been visited by Vander Plate, and she informed Tighe of the substance of the meeting. However, although the over-all impression conveyed by the testimony of Tighe and Mrs. Sheldon is that Tighe was aware the meeting had occurred just prior to Mrs. Sheldon's call, no testimony explicitly and unambiguously states that when Mrs. Sheldon called Tighe she informed him when the meeting with Vander Plate had occurred. Clearly, Mrs. Sheldon must at some point have given Tighe some indication as to the date of the meeting. Otherwise, in drafting the affidavit it is unlikely he and Lauren Colby (RNJ's counsel at the time) would have denied the meeting occurred in November. However, considering that she had previously been less than candid with RNJ in failing for some six months to tell RNJ she had violated their oral understanding by giving a written option to Kaplan, and considering also that the ALJ expressly found her to be an unreliable witness, it is conceivable Mrs. Sheldon in fact misinformed Tighe as to the date of the Vander Plate/Baker meeting.

7. Finally, there was no substantial motive for Tighe to misrepresent the date of the November meeting. The Sheldon affidavit and RNJ's opposition controverted all the material allegations of Vander Plate's petition. Whether or not Vander Plate had met with Mrs. Sheldon in November was not material. Denying that a meeting occurred in November served RNJ's purpose only in providing a basis for RNJ's assertion that Vander Plate's petition was "predicated upon erroneous statements of fact", one of the grounds on which RNJ asked that the petition be summarily dismissed. While deliberate misrepresentations, even unnecessary or immaterial ones, cannot be tolerated, the absence of motive here tends to show there was no culpable intent. In sum, the evidence does not establish a deliberate attempt to deceive the Commission in this instance.

8. The second instance of alleged lack of candor involves representations in amendments to the Lakewood application as to available funds from stock subscriptions. On January 9, 1968, RNJ's Lakewood application was amended to show a name change in the applicant,[2] a site change, and changes in costs and funds available. Earlier, the RNJ shareholders (Tighe, Boughrum, Seymour Krueger, and Tighe's father) had decided to bring in new investors to improve finances. Accordingly, in December 1967 the Lakewood application was transferred to a newly-incorporated concern (Lake-River Broadcasting Corporation) consisting of the old RNJ stockholders plus two new investors, Donald Towbin and Paul Larson. The January 9th amendment was signed by Tighe. An attachment to the amendment, entitled "Plan of Financing," submitted in lieu of a corporate balance sheet as called for, contained this statement:

> The stockholders of Lake-River Broadcasting Corp. have purchased 1,000 shares of the corporation's common stock for $10,000. These funds will be utilized to take care of the costs of prosecuting the application, and the other miscellaneous costs itemized under "other items" in Paragraph 1 of Section III of FCC form 301.

The amendment stated the cost of "other items" ("Fees, furnishing, and fixtures, misc., and contingencies") to be $4,000. Also, Tighe filed a "Supplementary Plan of Financing" on October 15, 1968 (after a financial issue had been designated respecting Lake-River's application, including inquiry into "whether the proceeds from the sale of capital stock are available in whole or in part for the purposes intended"), which stated:

> Lake-River Broadcasting Corp. *proposes to meet its cost of construction and operation* with a $100,000 loan from the First State Bank of Ocean County, *stock subscriptions which have been fully paid for in the amount of $10,000* and a maufacturers [sic] deferred credit from Gates Radio Corporation. . . . [Emphasis added.]

9. The prospective Lake-River principals had agreed prior to incorporating Lake-River that only Towbin and Larson would pay cash for their Lake-River stock, and that the old RNJ shareholders would receive their shares as an "equity exchange", i.e., the old RNJ stockholders were collectively credited with $6,570 for money previously expended by RNJ in prosecuting the Lakewood application; the Lake-River stock was issued to them in set-off of $6,200 of this credit; and the remaining $370 was regarded as a "loan" to Lake-River. Thus the stock issue actually generated only the $3,800 cash contributed by Towbin and Larson, rather than $10,000.[3] In fact, when the January 9th amendment was filed, only $30 had been actually paid in for stock. Towbin and Larson did not fully pay for their shares until the summer of 1968.

10. The ALJ made no findings or conclusions as to whether the representation in the January 9th amendment concerning funds from the stock sale constitute a misrepresentation or lack of candor. On review, the Board dealt with this aspect of RNJ's candor briefly. It simply noted the January 9th amendment stated funds from the stock

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[2] See footnote 1.
[3] Lake-River principals later made further contributions in 1968 and 1969, but these were loans rather than payments for stock.

would be relied upon to meet the cost of "other items," listed at $4,000—approximately the amount of cash actually paid for stock. It noted also other costs were to be met by a loan. The Board therefore concluded that although the language used by Lake-River was imprecise, it did not reflect an intent to deceive the Commission.

11. RNJ argues the representation in the January 9th amendment concerning proceeds available from stock subscriptions is at worst ambiguous, but that in context it is not misleading. On the contrary, we do find it to be misleading; whether it was intentionally so is a close question. It is undisputed that only $3,800 cash was actually to be paid for the stock.[4] RNJ contends that to say stock was "purchased" for $10,000 does not necessarily represent that $10,000 cash had already been paid in. Further evidence that this was not Tighe's intent, RNJ notes, is the statement in the amendment that no bank account had been opened yet. The Broadcast Bureau, on the other hand, argues that if Tighe had intended to convey the notion Lake-River at that point had in hand only a commitment to pay for shares, he would have used the term "subscribed." This dispute is beside the point. The issue is not whether Tighe intended to represent that cash had already been paid in, but whether he intended to represent that $10,000 had been or would be paid in cash. The old RNJ shareholders did indeed "purchase" their Lake-River shares; i.e., they exchanged their equity in the application as shareholders of RNJ for the shares. However, to say that the stock was "purchased for $10,000" is misleading, because it was not purchased for $10,000. It was purchased for $3,800 plus an equity valued at $6,200. The Board's conclusion, that the fact the amendment stated the proceeds from the sale of stock would be used to cover "other costs," which were stated to be $4000 (approximately the actual amount of cash paid for the stock), shows there was no intent to mislead the Commission as to the amount anticipated from this source, merely argues the amendment did not represent funds from the stock sale would be relied on to meet stated costs beyond $4000; however, the amendment is still misleading in representing that $10,000 was *available* from this source—whether or not it was shown to be entirely absorbed by stated costs. In effect, the amendment represented Lake-River had a cushion of $6000 over stated costs from this source in addition to the surplus of funds available from an anticipated loan of $100,000 over the stated $89,944 in cash requirements for construction and operation.

12. In any case, there is no contention the "Supplementary Plan of Financing" in the October 15th amendment (also signed by Tighe) is ambiguous in representing that "stock subscriptions which have been fully paid for in the amount of $10,000" would be used to cover "cost of construction and operation." This amendment represents: (1) again, that $10,000 had been paid for the stock, and (2) that the $10,000 would be used to pay for general costs of construction and operation, rather than "other items."

13. RNJ contends it had no motive for intentionally deceiving the Commission into believing that stock subscriptions generated $10,000,

[4] Towbin and Larson also promised to pay $115 apiece as loans to Lake-River.

since available cash (as stated in the January 9th amendment) exceeded the stated cash requirements by approximately $10,000—even if only $3800, rather than $10,000, is allowed for stock subscription proceeds. Nevertheless, it is incorrect to say Lake-River had no conceivable motive for representing cash proceeds from this source to be greater than they were. A misrepresentation that increases the apparent "cushion" of funds available over cash requirements can be beneficial to the applicant by tending to discourage inquiries into financial qualification. At the hearing a competing applicant presented evidence Lake-River had greatly understated the prospective construction and operating costs entailed at its proposed site (the Lipman site). The ALJ and the Board found that Lake-River's costs estimates had at least been made in good faith, but because Lake-River's application was dismissed before issuance of the Initial Decision, it was never determined whether Lake-River had understated its costs. Whether or not its cost estimates had been made in good faith, Lake-River may conceivably have anticipated, when it filed the January 9th amendment changing to the Lipman site—a lake and swamp area—that its estimates of costs and cash required might be disputed, as in fact they were. In this context, a misrepresentation that increased the apparent "cushion" of funds would be beneficial. Also, when the misstatement regarding stock proceeds was reasserted in the October amendment, a site feasibility issue, as well as an inquiry as to whether the stock proceeds were "available in whole or in part for the purposes intended," had been designated.

14. On the other hand, a circumstance which tends to indicate deliberate deception was not intended is that the first indication of the true nature of the stock transaction appeared in affidavits by Tighe and another RNJ/Lake-River principal introduced into the record by Lake-River itself at the hearing.

15. Lake-River's representation concerning funds available from stock subscriptions was clearly misleading on its face. A possible motive for the misrepresentation—although not perhaps an especially compelling one—existed. The misrepresentation was repeated. The one significant exculpatory circumstance is Lake-River's voluntary production of the affidavits disclosing the nature of the stock transaction. The question of intent is a close one, but having carefully considered the record, we cannot say the evidence establishes a deliberate lack of candor in this instance with the "certainty . . . reasonably called for with respect to a finding of this nature." See *Grenco, Inc. et al.*, 39 FCC 2d 732, 737 (1973). At best, however, the statements regarding stock subscriptions, as well as the other representations discussed herein, display inexcusable carelessness in submissions to the Commission. While we choose not at this point to prolong this already overly drawn-out proceeding by designating a gross carelessness issue against RNJ, we shall not lightly regard further evidence that this applicant lacks the degree of responsibility expected of licensees.

16. The third instance of a possible lack of candor involves a representation concerning drainage of a lake at the site proposed by Lake-River in its January 9, 1968 amendment (the Lipman site). The Lipman site is swampy and partially covered by an artificial lake. The nearest paved road is across the lake from the proposed antenna

site. In a petition to enlarge filed by the Mid-State Broadcasting Co. it was asserted that because of the lake and swamp, construction costs would substantially exceed those set forth in Lake-River's application. In particular, Mid-State alleged there was no existing road access, and thus the expense of building a road should have been considered in calculating costs. With its opposition to Mid-State's petition to enlarge Lake-River submitted an affidavit by Robert Boughrum, an RNJ/Lake-River principal. Boughrum's affidavit states, in pertinent part, that:

> . . . Lipman [the site owner] assured me that the land could and would be drained since he had access to and controlled the sluice gate controlling the water on the property;
>
> *That with the land drained, no road would have to be built since without water, one can drive to the antenna site.* . . . [Emphasis added.]

17. In fact, Lipman had told Boughrum the lake could be drained to facilitate construction, but only from November through April of any year. The Broadcast Bureau contends Boughrum's affidavit asserting no access road would be necessary with the lake drained was deliberately misleading, because it implied the lake would be permanently drained when Boughrum knew this was not the case. The Review Board concluded the Boughrum affidavit was not deliberately misleading. In its view, "Boughrum merely indicated therein his belief that costs of construction would not be increased due to the nature of its site because, during construction, draining would eliminate any such problem." That interpretation is strained. The allegations in Mid-State's petition to which Boughrum's affidavit is obviously addressed appear in paragraph 13 of the petition. Paragraph 13 alleges the Lipman site is a lake and swamp area, that there is no road access, and that costs for construction of building, antennas and roads are far in excess of those stated by Lake-River. In this context, Boughrum's reply that the site would be drained, and that "*with the land drained, no road would have to be built*, since without water one can drive to the antenna site," [emphasis added] clearly conveys the impression the lake would be *permanently* drained; otherwise, Boughrum's assertion that no road would have to be built does not follow.

18. Regardless whether after drainage one could drive to the antenna site, it is undisputed that the lake would only be drained temporarily, and that Boughrum knew this. RNJ contends Boughrum had no motive to mislead the Commission, because: (1) Lake-River's cost estimates for the Lipman site had been made in good faith, and more money could be obtained if needed; and (2) such a deception would be "utterly mad" because Lieberman (a Mid-State principal) was a Lakewood resident who knew the lake could only be drained temporarily. As to (1), whatever the good faith of Lake-River's original estimate, the fact that Mid-State requested a site feasibility issue against Lake-River on the ground, *inter alia*, that there was no road access gave Lake-River ample motive for misrepresenting that no road would be needed after drainage. As for (2), it is not readily apparent Boughrum would have considered it "utterly mad" to misrepresent the possibility of permanent drainage. An affidavit of Lieberman attached to the Mid-State petition did disclose Lieberman knew the lake was used

for irrigation and could be drained, but there is no indication Lieberman knew that Lipman would not agree to permanent drainage.

19. The Bureau asserts that Lake-River deliberately refrained from filing Lipman's affidavit, which revealed that only temporary drainage would be permitted, with its opposition of September 3, 1968, and instead substituted Boughrum's. The jurat on Lipman's affidavit indicates it was executed on August 29, 1968. Although Lake-River's opposition is stamped as received by the Commission on September 3, the attached certificate of service indicates the pleading was served and sent to the Commission on August 29th. The failure to file Lipman's affidavit is adequately explained by the fact the affidavit was executed on the same day the opposition left the hands of Lake-River, and so apparently was not received in time to be attached. RNJ argues that if Lake-River had wanted to misrepresent the duration of draining, it would never have solicited Lipman's contradictory affidavit. However, there is nothing in the record to indicate whether Boughrum or Lake-River knew precisely what Lipman's affidavit would say before they received it. In an appendix to its brief RNJ submitted a letter which Boughrum wrote on August 23, 1968, to Lipman's attorney, which letter discloses that the Lipman affidavit was drafted by Boughrum in the form in which Lipman signed it and that Boughrum was concerned that the affidavit be signed and returned in time to be submitted to the Commission with Lake-River's opposition. This letter shows Boughrum's own affidavit had not been intentionally misleading; it is unlikely that Boughrum would have intentionally drafted, for submission to the Commission, mutually contradictory affidavits. Although this letter has apparently been continuously available to RNJ/Lake-River, it was not put in evidence at the hearing. Ordinarily, an applicant will not be given an additional opportunity to present evidence which was continuously available in order to make a better case for a grant. In this case, however, there is justification for RNJ/Lake-River's failure to produce the letter at the hearing. The charge that Boughrum's affidavit lacked candor was raised for the first time in the Bureau's proposed findings before the ALJ. The probity of Boughrum's affidavit is a matter not touched on by any of the designated issues. The applicant not having had fair notice of this charge before hearing, to disqualify it on this question now, without considering the letter, would be unfair. Good cause therefore exists to reopen the record for the sole purpose of allowing admittance of the letter. Since the Broadcast Bureau has not disputed the authenticity of the letter or contended its acceptance would require an additional hearing, we shall admit the letter without further delaying this proceeding by remanding. We accordingly conclude that the misleading character of Boughrum's affidavit resulted from inadvertence, rather than from fraudulent intent.

20. The evidence does not establish that principals of RNJ have been guilty of deliberate misrepresentations. Since RNJ has been found qualified in all other respects, we shall affirm the Decision of the Review Board in this proceeding, which granted RNJ's application.

21. Accordingly, IT IS ORDERED, that the record IS REOPENED, the document filed in this proceeding on March 5, 1974 by

Radio New Jersey, being a letter by Robert Boughrum dated August 23, 1968, IS ADMITTED in evidence, and the record IS CLOSED.

22. IT IS FURTHER ORDERED, that the Decision of the Review Board released on December 11, 1973, 44 FCC 2d 51, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-165

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In Re Applications of | |
|---|---|
| RADIO TELEPHONE CO. OF GAINESVILLE, GAINESVILLE, FLA. | Docket No. 19678<br>File No. 426-M-L-62 |
| W. DONALD MOLITOR AND DONALD N. MOLITOR, D.B.A. CANAVERAL COMMUNICATIONS, COCOA, FLA. | Docket No. 19679<br>File No. 294-M-L-62 |
| MARINE TELEPHONE CO., INC., MIAMI, FLA. For a Public Coast Class III (VHF) Radio Station To Serve the Daytona Beach-New Smyrna Beach, Fla., Locality | Docket No. 19680<br>File No. 232-M-L-52 |

APPEARANCES

*Norman E. Jorgensen* and *Simon Tucker*, on behalf of Radio Telephone Company of Gainesville; *Wayne V. Black* and *David L. Hill*, on behalf of Marine Telephone Company, Inc.; and *Terrence P. O'Brien*, *Richard P. Breen* and *Sherman W. Pratt*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted May 3, 1974; Released May 8, 1974)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding involves the mutually exclusive applications of Radio Telephone Company of Gainesville (Radio-Tel) and Marine Telephone Company, Inc. (Marine Tel) for a VHF Public Coast station to be located on the east coast of Florida in the Daytona Beach-New Smyrna Beach locality.[1] In a Memorandum Opinion and Order, FCC 73-142, released February 14, 1973, the Commission found the applicants fully qualified and designated the applications for hearing on the following issues:

> (*a*) To determine comparatively which applicant will provide the public with the best public coast station service based on the following considerations:
>
> (1) coverage area and its relation to the greatest number of potential users;
>
> (2) hours of operation;
>
> (3) quality and variety of service;
>
> (4) ability to effectively participate in the maritime mobile radio safety system;

[1] A third applicant, Canaveral Communications (Canaveral), failed to appear at the prehearing conference or hearing. Therefore, its application will be dismissed.

(5) economic viability, as affects licensee's ability to provide continuous and uninterrupted reliable and efficient service for at least one year;

(6) rates and charges;

(7) qualifications of management, operations, and other personnel; and

(8) interconnection with landline facilities.

(*b*) To determine in the light of the evidence adduced on all the foregoing issues, which application should be granted.

In an Initial Decision, FCC 73D–46, released August 23, 1973, Administrative Law Judge Frederick W. Denniston recommended a grant of Radio Tel's application because: "The preference accorded to Radio Tel with regard to rates is so substantial that it should be the successful applicant even if no further preference were accorded for its greater coverage. The two preferences together, however, are overwhelmingly in favor of the grant. . . ." The Administrative Law Judge found no material differences with respect to the other criteria. The proceeding is now before the Review Board on exceptions filed by Marine Tel and Radio Tel. The Board has reviewed the Initial Decision in light of the exceptions and briefs, the argument of the parties,[2] and our examination of the record. Briefly stated, we are in accord with the Presiding Judge's findings of fact and conclusions of law and with his ultimate recommendation to grant Radio Tel's application and deny Marine Tel's. Except as modified herein and in our rulings on exceptions contained in the attached Appendix, the Presiding Judge's findings and conclusions are adopted.

2. *Coverage Area and Relation to Potential Users.* The Board believes that Radio Tel is entitled to a slight preference under this issue, rather than the substantial preference accorded by the Presiding Judge. It is undisputed that Radio Tel's proposed 17 dbu contour would be larger than Marine Tel's. Marine Tel claims, however, that no comparative advantage should be given to Radio Tel on account of its greater coverage area because Radio Tel has failed to show that this area will permit it to serve a significantly greater number of potential users than Marine Tel will be able to serve. Marine Tel also contends that the 30,000 boats that Radio Tel claims are registered within its proposed coverage area are not a valid indication of potential communication users because no evidence was introduced to show how many, if any, of the 30,000 boats are equipped with VHF transmitters. It is very clear from our review of the record that serious deficiencies exist in the showings of both parties with respect to this issue. Most significantly, neither party has related its coverage area to the greater number of potential boat users. While challenging Radio Tel's showing, however, Marine Tel has failed to submit any affirmative evidence of its own as to the number of potential users in its or its opponent's proposed service areas.[3] In contrast, Radio Tel has at least shown

[2] Oral argument was held before a panel of the Review Board on March 14, 1974. The Safety and Special Radio Services Bureau did not file any pleadings with the Board. In its proposed findings and conclusions, however, the Bureau recommended a grant of the Marine Tel application.

[3] The Board rejects Marine Tel's argument that evidence as to the number of potential users in its proposed service area was not required by the designation Order. The issue, by its terms, clearly relates coverage to users.

that there are 30,000 boats within its proposed coverage area.[4] In the Board's view, Radio Tel's greater coverage area entitles it to a preference over Marine Tel. In this regard, the Commission has stated that "operation of a local station over an extended area could be advantageous to the public." [5] In sum, Radio Tel deserves a slight preference on this issue.

3. *Economic Viability Issue.* Initially, it is to be noted that on the basis of the information set forth in their respective applications, the Commission found the applicants financially qualified to construct and operate their proposed stations. Hence, the economic viability issue as worded inquires into the *comparative* financial qualifications of the applicants, and not to their basic financial qualifications. Although both applicants appear now to question each other's basic financial qualifications through the guise of the *comparative* economic viability issue, their respective arguments do not establish that the Commission was in error in its original finding that they are qualified to be Commission licensees. Nor have they at any time in this proceeding filed timely petitions to enlarge or modify issues directed against the Commission's initial finding. Hence, the Board does not believe that the inadequacies of the showings of the applicants under the *comparative* economic viability issue adversely affect the Commission's initial basic financial qualification finding. We, accordingly, find no need to remand this proceeding on the *comparative* economic viability issue as requested by Marine Tel at the oral argument. *Cf. Colorado Radio Corp.* v. *FCC*, 73 App. D.C. 225, 227, 118 F. 2d 24, 26 (1941). The Board agrees with the Presiding Judge that neither applicant has made an impressive showing with respect to the economic viability issue and therefore no comparative preference should be accorded either applicant. Although we have reached this conclusion, the Board nevertheless wishes to point out that it has serious doubts concerning the economic viability issue in view of the fact that the issue as worded inquires into the *comparative* financial qualifications of the applicants. Since it is well established that financial qualifications are "a basic rather than a comparative factor . . .", *Contact*, 19 FCC 566, 587, 10 RR 660, 682 (1954),[6] it is doubtful whether a preference under the criterion would be appropriate in any event.

4. *Rates and Charges.* The Board believes that Radio Tel's proposed lower rates entitle it to a moderate preference.[7] Although Radio Tel's

[4] Dorsey A. Sanders, Jr., president and director of Radio Tel, testified that he contacted the assessors' office in the counties included within Radio Tel's proposed coverage area to determine the total number of boats.

[5] See the *Report and Order amending the Rules regarding Public Coast Stations,* 35 FCC 2d 642, 24 RR 2d 1989 (1972).

[6] In *Contact*, the Commission held:

"Each applicant herein has demonstrated on the record that it is financially qualified to construct and operate its proposed station. Hav-A-Call, in its exceptions to the Initial Decision, concedes that Contact meets minimum financial qualifications, but contends that, unlike the broadcast services, in common carrier operations financial qualifiations should receive comparative consideration. Initially, we believe that Contact has established on the record more than minimum financial qualifications. Secondly, the Commission cannot accede to the position that grants in the common carrier services should to any degree be based on a determination as to which applicant has the most money. Financial qualifications are a basic rather than a comparative factor and both applicants have met this requirement, 19 FCC at 587, 10 RR at 682."

[7] Radio Tel's basic charge will be $1.00 for each call of up to three minutes with an additional charge of 30 cents for each additional minute. Marine Tel's corresponding charges are $1.50 and 50 cents.

rate was determined on the basis of an industry average rather than on its operating experience, there is no evidence that the rate is not a reasonable one in terms of providing an adequate rate of return on its investment. In addition, we must reject Marine Tel's contention that since the rates may be increased almost at will, no preference, and certainly not a substantial preference, should be given to Radio Tel on this issue. The Communications Act and the Commission's Rules do not support this contention.[8] Moreover, Marine Tel has supplied no evidence to show that Radio Tel would, in fact, make any attempt within the foreseeable future to alter its rate structure. The record evidence—which is uncontroverted—shows that Radio Tel's proposed rates are lower than Marine Tel's. Therefore, Radio Tel is entitled to a preference.

5. *Qualifications of Personnel.* In our opinion, neither applicant warrants a preference for the qualifications of its proposed personnel. We believe that whatever advantage Marine Tel might have because it has full-time engineers on its staff and because its antenna will be located on the premises of an electronic servicing firm is offset by the fact that its actual operation will be conducted by an untried answering service, while Radio Tel's operation will be conducted by an answering service which has several years of experience.

6. *Summation.* We conclude that, on a comparative basis, Radio Tel's application should be granted. Radio Tel deserves preferences on the coverage and rate issues; Marine Tel merits no preference at all. While neither applicant merits a preference for economic viability, qualifications of personnel issues, or any of the other criteria mentioned in the designation Order, the preferences accorded Radio Tel on the coverage and rate issues warrant the conclusion that a grant of its application would better serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Canaveral Communications IS DISMISSED; that the application of Radio Telephone Company of Gainesville (File No. 426–M–L–62) for a VHF public coast station in the Daytona Beach-New Smyrna Beach locality IS GRANTED; and that the application of Marine Telephone Company, Inc. (File No. 232–M–L–52) for the same authorization IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK, *Member, Review Board.*

[8] See Sections 203 and 204 of the Communications Act of 1934; as amended; and Sections 61.58 and 81.179(a)(1) of the Commission's Rules.

## APPENDIX

*Rulings on exceptions of Marine Telephone Co., Inc.*

| *Exception No.* | *Ruling* |
|---|---|
| 1 | Denied. See footnote 3 to this decision. |
| 2 | Granted. See par. 2 of this decision. |
| 3, 5 | Denied. See par. 3 of this decision. |
| 4 | Granted insofar as a "substantial" preference is concerned. Denied in all other respects. See par. 2 of this decision. |
| 6 | Granted insofar as a "substantial" preference is concerned. Denied in all other respects. See par. 4 of this decision. |
| 7 | Denied. See par. 5 of this decision. |
| 8, 12, 13 | Denied for the reasons stated in the whole of this decision. |
| 9 | Denied. See par. 2 of this decision. |
| 10 | Denied as being of no decisional significance. |
| 11 | Denied. Marine Telephone has failed to show that the traffic projections are unreasonable. |

*Rulings on exceptions of Radio Telephone Co. of Gainesville*

| | |
|---|---|
| 1, 2 | Denied. See par. 3 of this decision. |
| 3 | Denied. Both applicants propose essentially the same kind of service. Therefore, neither applicant deserves a preference on issue (a) (7). |



104-037—74——8

FCC 73D-46

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In Re Applications of | |
|---|---|
| RADIO TELEPHONE CO. OF GAINESVILLE, GAINESVILLE, FLA. | Docket No. 19678<br>File No. 426-M-L-62 |
| W. DONALD MOLITOR AND DONALD N. MOLITOR, D.B.A. CANAVERAL COMMUNICATIONS, COCOA, FLA. | Docket No. 19679<br>File No. 294-M-L-62 |
| MARINE TELEPHONE CO., INC., MIAMI, FLA. For a Public Coast Class III (VHF) Radio Station To Serve the Daytona Beach-New Smyrna Beach, Fla., Locality | Docket No. 19680<br>File No. 232-M-L-52 |

APPEARANCES

*Norman E. Jorgensen* and *Simon Tucker*, on behalf of Radio Telephone Company of Gainesville; *Wayne V. Black* and *David L. Hill*, on behalf of Marine Telephone Company, Inc.; and *Terrence P. O'Brien*, *Richard P. Breen* and *Sherman W. Pratt*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERICK W. DENNISTON

(Issued August 17, 1973; Released August 23, 1973)

PRELIMINARY STATEMENT

1. These mutually exclusive applications were designated for hearing by the Commission's Order released February 14, 1973 (FCC 73-142) on the following issues:

(*a*) To determine comparatively which applicant will provide the public with the best public coast station service based on the following considerations:

(1) coverage area and its relation to the greatest number of potential users;

(2) hours of operation;

(3) quality and variety of service;

(4) ability to effectively participate in the maritime mobile radio safety system;

(5) economic viability as affects licensee's ability to provide continuous and uninterrupted reliable and efficient service for at least one year;

(6) rates and charges;

(7) qualifications of management, operators, and other personnel; and

(8) interconnections with landline facilities.

(*b*) To determine in the light of the evidence adduced on all the foregoing issues, which application should be granted.

*Canaveral Communications*

2. W. Donald Molitor and Donald N. Molitor, d/b as Canaveral Communications (Canaveral), Cocoa, Florida, did not participate in the prehearing conference, the hearing, or in filing proposed findings and conclusions. At the prehearing conference, it was announced that by a relayed message, Canaveral had indicated its intention to participate in the proceeding, though not then present. It did not, however, distribute written testimony in advance of the hearing on the prescribed date and was not represented at the hearing. Counsel for the Safety and Special Radio Services Bureau stated, however, that he had received a telephone communication from Canaveral indicating that although one of the partners was recently deceased, it was still intended to prosecute the application. By Order released May 21, 1973 (FCC 73M–603) closing the record herein, the foregoing was noticed and the presumption expressed that the application had been abandoned. No steps have been taken by Canaveral to rehabilitate its application, and it will accordingly be denied without further consideration herein.

3. Hearings were held herein on May 15 and 16, 1973, in Washington, D.C., and depositions of a number of witnesses were taken in Daytona Beach, Florida, pursuant to an Order released April 4, 1973 (FCC 73M–415). The record was closed by Order released May 21, 1973 (FCC 73M–603). Proposed findings were filed by the Safety and Special Radio Services Bureau (Bureau), by Radio Telephone Company of Gainesville (Radio Tel) and Marine Telephone Company, Inc. (Marine Tel), and replies thereto were filed by the latter two.

FINDINGS OF FACT

4. *The applicants:* Radio Telephone Company of Gainesville (Radio Tel), Gainesville, Forida, is a corporation owned by Dr. Dorsey A. Sanders, Jr. (49%) and his wife, Jo-Ann Sanders (1%), and by J. D. Henry (49%) and his wife, Billie Henry (1%). Dr. Sanders, a practicing veterinarian, is President and a Director, his wife, Vice President, J. D. Henry is Treasurer and a Director, and his wife is Secretary.

5. Radio Tel is licensee of KIY 464, a radio common carrier licensed to Daytona Beach, Florida, providing two-way radio service under Part 21, and also one-way signalling service on a secondary basis. It also operates KUC 852 providing one-way signalling service in the same area. In the Gainesville area, it operates KFL 922 providing two-way common carrier service and one-way signaling, under Part 21, and KJU 814 providing one-way signalling service.

6. Marine Telephone Company, Inc. (Marine Tel) of Miami, Florida, is licensee of Public Coast III–B stations at Atlantic Highland, New Jersey; Wilmington, North Carolina; Georgetown and

Charleston, South Carolina; Savannah, Georgia; Boca Raton,[1] Fort Lauderdale, Homestead, Marathon, Key West and Naples, Florida.

7. *Issue a(1)—Coverage and Potential Users.* The 17 dbu contours of each applicant form approximately concentric circles centered on Daytona Beach (the antennas are 2.5 miles apart), extending as follows:

| Bearing (degrees) | Radio Tel (miles) | Marine Tel (miles) | Bearing (degrees) | Radio Tel (miles) | Marine Tel (miles) |
|---|---|---|---|---|---|
| 0 | 55.09 | 45.69 | 180 | 50.49 | 43.45 |
| 45 | 52.90 | 48.63 | 225 | 40.60 | 39.70 |
| 90 | 53.06 | 50.58 | 270 | 41.92 | 36.67 |
| 135 | 55.25 | 48.54 | 315 | 43.83 | 40.27 |

Thus, the computed coverage area of Radio Tel exceeds that of Marine Tel at the radials of from .9 to 9.4 miles. Roughly half of the contour circles extends over the ocean and intersects the coastline north of St. Augustine in the case of Radio Tel and south of that city as to Marine Tel; at the southern coastline intersections, that of Radio Tel is below Titusville and immediately north of Cape Kennedy, whereas that of Marine Tel is through Titusville and further north of Cape Kennedy.

8. Each of the applicants would serve portions of three marine routes: the St. Johns River, the Intracoastal Waterway, and the Atlantic Ocean. Marine Tel offered no evidence as to the number of potential users in its area, but Radio Tel has shown that within its larger service area there are approximately 30,000 boats registered in the Counties of Flagler, Lake, Seminole, Brevard, St. Johns and Putnam, all or substantial portions of which are in the Radio Tel proposed area.

9. While the record does not quantify the excess of Radio Tel's coverage, it is substantial [2] and the number of potential users correspondingly larger. No comparison of potential users is possible in view of Marine Tel's failure to offer any evidence on that subject.

10. *Issue a(2)—Hours of Operation.* Each of the applicants proposes 24-hour service, 7 days a week, throughout the year.

11. *Issue a(3)—Quality and Variety of Services.* Radio Tel will supply message forwarding, message holding and message relaying, as well as interconnection with land-line telephones. Marine Tel will provide essentially the same service, although described somewhat differently, but in addition, will provide what it terms a "float plan" whereby a subscriber may file a plan of the vessel's destination, estimated time of arrival, return destination, and estimated time of return. It is said this will permit notification of authorities in case of emergency. In its existing tariff in use at its other stations and which will be used if the present application is granted, this service is further defined as the acceptance of a message to the U.S. Coast Guard or

[1] By Public Notice, July 23, 1973, Report No. 1216, the Commission authorized discontinuance of the service at Boca Raton.

[2] Radio Tel offers a computation suggesting that its total coverage area is 25% greater than Marine Tel's, and that as to the Atlantic Ocean portion it is 48% greater, but such computations are not of record.

other Search and Rescue Service which is to be filed at a pre-specified hour, on condition it is not previously cancelled by the sender. For pricing purposes, the charge for "Float Plan Service" is the same as for forwarded message service with additions for added services. As part of its shore-to-ship service, Marine Tel will, in those instances where the calling party is uncertain as to vessel location, contact all its stations within the general cruising area to seek to notify the vessel of trafficking held or to interconnect it with land-lines. Moreover, Marine Tel will submit to its customers a single statement of charges covering all of its stations. The captains of three private vessels attest to the desirability of this unified billing for their trips along the coast between Florida and northern points.

12. *Issue a(4)—Ability to Participate Effectively in the Maritime Mobile Radio Safety System.* Each applicant indicates its intention to participate in the maritime mobile radio safety system.

13. *Issue a(5)—Economic Viability.* On the basis of an estimated 10,000 calls the first year, Radio Tel estimates that it will have revenues of $12,035 for the first year, with net earnings before income taxes of $200. It would expect its earnings to increase to $2,000 in the second year. While no financial statements of Radio Tel were submitted, its President testified it can provide continuous and uninterrupted service for more than a year.

14. Marine Tel, based on the operation of its Naples, Florida, station, estimates that it will require 60 to 80 calls per month to cover its direct operating expenses and that it expects to reach a break-even point within six to eight months after institution of service. The consolidated balance sheet of Marine Tel indicates a precarious financial condition with a negative surplus and current liabilities nearly double current assets. It has provided a letter from the First National Bank of Fort Lauderdale indicating it would lend Marine Tel $100,000 upon pledge of acceptable collateral. Its chief financial officer testified that Marine Tel has sufficient cash flow to carry on the proposed operation for at least twelve months.

15. While the financial data offered are far from satisfactory, it is found that each of the applicants has demonstrated the economic viability of its proposal and ability to provide continuous and uninterrupted service for at least one year.

16. *Issue a(6)—Rates and Charges.* The basic charge of Radio Tel will be $1.00 for each call of up to three minutes, with an additional charge of $0.30 for each additional minute, or fraction. The corresponding charges of Marine Tel are $1.50 plus $0.50 for each additional minute, or fraction. Each would add the actual land-line charge for calls interconnected with the land telephone system.

17. *Issue a(7)—Qualifications of Personnel.* The principals of Radio Tel have been experienced in radio operations for over five years, and now render service to vessels in the Daytona Beach area through special endorsement of its radio common carrier license. It will render service under an agreement with Cord-Wall Telephone Answering Service which now services its Daytona Beach station, and the Answer-all Telephone Answering Service at New Smyrna Beach, Florida. Supervision will be supplied by Dr. Sanders to the extent of 40 to 50 hours per week; Mrs. Henry will spend the entire business week in

Daytona Beach; and Mrs. Sanders and Mr. Henry will participate as required.

18. Marine Tel operates a network of Public Coast III–B stations. It proposes to operate the Daytona Beach station through agreement with Blocks Telephone Answering Service, and maintenance service will be provided under contract with Radio Marine Electronics, of Daytona Beach. Supervision will be supplied from Miami by Marine Tel's officers.

19. *Issue a(8)—Interconnection.* Each applicant will provide interconnection with the Southern Bell Telephone Company.

CONCLUSIONS

1. On several of the specified issues, no material difference in proposals is indicated and accordingly no preference can be awarded in the comparative evaluation. In this category are issues (2), hours of operation; (4), ability effectively to participate in the maritime mobile radio safety system; and (8), interconnection with land-line facilities. It is concluded that as to each of these issues no comparative choice exists between the two applicants.

2. *Issue 1—Coverage Area.* A substantial preference must be accorded to Radio Tel because of the larger area and greater number of potential users to be served. The size of that excess cannot be determined due to the failure of Marine Tel to submit estimates of the number of potential users within its 17 dbu service area. The contention of the Bureau that the coverage is only "slightly greater" is not supported by the record, and the argument that in any event it does not represent a comparative advantage must be rejected in the light of the express language of the Commission's designated issue.

3. The Bureau supports its "no comparative advantage" recommendation on the theory that the class of station involved is intended to provide primarily local service and that in view of the 30-mile spacing requirement of Section 81.303(b) of the Rules, any excess coverage beyond 30 miles should be ignored. The Bureau cites no precedent for this position and, even if it expresses acceptable policy, it would seem more appropriate to express it in a general rule rather than as a surprise element in a comparative evaluation, of which the parties had no notice. To the contrary the issue specified by the Commission in the designation order related to the "greatest number of potential users" without the suggested limitation. Moreover, with respect to other issues discussed below, the Bureau opts for Marine Tel because of perceived regional characteristics.

4. *Issue 3—Quality and Variety of Service.* As found above, the services proposed by each applicant are essentially the same. The Bureau finds a slight comparative advantage should be accorded Marine Tel, however, because of operation of other stations in the regional area and because of its "unique" float plan.

5. In its reply findings, Radio Tel vigorously contends the float plan is no more than message forwarding which it too provides. It contends, however, that the service so described does not relate to local Daytona Beach-New Smyrna Beach vessel traffic, but to coastwise vessels which would file such plans. Radio Tel also contends that the

"safe arrival reports" which are contended to be a special feature of Marine Tel's service are but another form of message forwarding. These ancillary services, if indeed they be, were not clarified in the testimony at the hearing, and, absent a clear showing that these two claimed "special" services differ from message forwarding, it must be concluded that there is no essential difference in the services proposed to be rendered by the two applicants, and hence no comparative preference can be accorded to Marine Tel, as proposed by it and the Bureau.

6. In addition, Marine Tel proposes a unified billing which would benefit vessels moving between Florida and northern points on a twice-yearly basis, and utilizing a series of Marine Tel stations along the coast, which would save vessels establishing credit at multiple individual stations along the way. Marine Tel, in its proposed conclusions, does not claim a preference for this factor nor does the Bureau propose one. It is concluded that no preference can be made for such a factor which, though of convenience to the limited number of vessels which would benefit therefrom, does not relate directly to the needs of the service area proposed.

7. *Issue a(4)—Participation in Maritime Mobile Radio Safety System.* While, as noted above, each applicant is found to have the intent to participate in the system, Marine Tel contends it is entitled to a comparative preference on this issue. It points to the fact that, according to its testimony, it has developed procedures for its participation in the system, whereas Radio Tel has merely indicated it has the capability to participate but has not shown how this would be accomplished.

8. In reply, Radio Tel objects to this contention alleging there is no such "system" in existence but remains for future development. The Commission, in specifying this issue, failed to define the "system" and nothing can be found in the rules, other than certain requirements in Part 81 of the rules in connection with boating safety. Those rules apply to all coast stations and do not specify a "system" as such. The testimony of Radio Tel indicates the U.S. Coast Guard may be in the process of developing a "system," but Marine Tel operating rules written in advance thereof cannot qualify for a preference, as it cannot be determined at this time what rules may be required. Accordingly, no preference will be accorded Marine Tel.[3]

9. *Issue a(5)—Economic Viability.* Neither applicant has made an impressive showing on this issue. Radio Tel chose to offer personal financial statements of its principals rather than of the corporate applicant. The statements of Marine Tel, on the other hand, show a deteriorated condition bordering on insolvency. Each has offered unequivocal testimony, however, that it can operate on a viable basis; each has operating experience in the field, Radio Tel through its endorsement service in the Daytona Beach area, and Marine Tel at other locations. Accordingly, no reason is apparent for not accepting these assurances, and it is concluded each can conduct a viable operation for at least a year. The Marine Tel suggested application of a microscope to the financial showing of Radio Tel must be rejected; if the

[3] This issue is attended by an air of mystery, as heretofore noted, there apparently is no definition of such a system in the Commission Rules.

same microscope were applied to the showing of Marine Tel, it also would undoubtedly fail to meet the test.

10. *Issue a(6)—Rates and Charges.* Marine Tel contends that no conclusion should be drawn from the variance in the proposed rates, while the Bureau finds a definite "advantage" from the lower rates. In view of the fact that the proposed basic charge of Marine Tel is 50% higher than Radio Tel ($1.50 versus $1.00), a substantial comparative preference must be accorded to Radio Tel.

11. *Issue a(7)—Qualifications of Management, etc.* The record does not support a comparative advantage to either applicant. While the principals of Marine Tel have an aggregate of greater experience in the electronics field, and includes engineers in its staff, the advantage would be minimal, if any, due to the fact that the actual operation will be by an untried answering service. Such minimal advantage, if assumed, is offset by the fact that the answering service utilized by Radio Tel has been serving the latter for five years, including marine service under endorsement.

12. The Bureau proposes, under the issue of "qualifications of management, operators, and other personnel," to accord a comparative preference to Marine Tel for the reason that it has full-time engineers who would assist in maintaining the proposed station and because its antenna will be located on the premises of an electronic servicing firm that will perform the maintenance. While a preference may be accorded the fact that Marine Tel has engineers on its staff at other locations, it must be a slight one as the actual operation is to be conducted by contract personnel, including maintenance.

ULTIMATE CONCLUSIONS

13. The preference accorded to Radio Tel with regard to rates is so substantial that it should be the successful applicant even if no further preference were accorded for its greater coverage. The two preferences together, however, are overwhelmingly in favor of the grant. It is accordingly concluded that the application of Radio Tel should be granted and that of Marine Tel denied.

Pursuant to the foregoing, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of Radio Telephone Company of Gainesville, Gainesville, Florida (File No. 426–M–L–62) is GRANTED; the application of Marine Telephone Company, Inc., Miami, Florida (File No. 232–M–L–52) is DENIED; and the application of W. Donald Molitor and Donald N. Molitor, d/b as Canaveral Communications, Cocoa, Florida (File No. 294–M–L–62) is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
FREDERICK W. DENNISTON, *Administrative Law Judge.*

FCC 74-341

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In Re Application of
ARTHUR B. RALPH
Concerning Acquisition of Control of Station WMWM, Wilmington, Ohio, and Station WBRJ, Marietta, Ohio

APRIL 2, 1974.

ARTHUR B. RALPH, Esq.,
*Gannett Co., Inc.,*
*55 Exchange Street,*
*Rochester, N.Y. 14614.*

DEAR MR. RALPH: This refers to your application for acquisition of control of Station WMWM, Wilmington, Ohio, and Station WBRJ, Marietta, Ohio, licensed to 5 KW, Inc., from Daniel Burton, Carl Clovis II, The Times Company, et al., to Gannett Co., Inc. (BTC-7228).

Section 310(a) of the Communications Act of 1934, as amended, provides in pertinent part that a station license,

". . . shall not be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation . . . of which more than one-fourth of the capital stock is owned of record or voted . . . by aliens . . . if the Commission finds that the public interest will be served by the refusal or the revocation of such license."

You report that all of the officers and directors of Gannett Co., Inc. and all officers and members of the Gannett Newspaper Foundation are U.S. citizens. Holders of approximately 41% of Gannett's stock is known to be held by U.S. citizens—including the stock held by the Foundation and the Trusts for the benefit of U.S. citizens. In order to account for the citizenship of the remaining 59% of the outstanding stock, you sent out questionnaires to 500 of your stockholders "not associated with management," whose names were selected at random. 352 stockholders owning 999,346 shares (out of the total outstanding shares of approximately 20,510,000) responded to the questionnaire. Of those responding, only three shareholders representing 38,850 shares (or 3.9% of those responding) "indicated that they were either aliens or representatives of a foreign government." You state that "follow-up on those persons not responding was not considered feasible." You contend, however, that "even if those stockholders not responding are considered aliens, the known and determined ownership of Gannett Co., Inc. stock by United States citizens is well in excess of 80 percent."

The Commission is of the view that the above statistical sampling is not statistically reliable and inadequate to show that less than 25% of Gannett's stock is held by aliens. With such a large number of per-

sons not responding (148 out of 500 or approximately 30%, additional efforts must be made to overcome the possible "non-response bias" of the shareholders who did not respond. For instance, a large number of the persons not responding may not have responded because they *were not* U.S. citizens. It is also noted that average shares held by the persons responding is 2,839 whereas the average for the 3 alien owners is 12,950. Thus, it may also be true that the aliens within the 148 shareholders who did not respond hold stock in much larger blocks than the non-aliens. While the Commission concludes that the statistical survey is clearly deficient, it should be noted that Gannett is an existing licensee of the Commission rather than a new entry into broadcasting. In these circumstances we have concluded that the public interest, convenience and necessity would be served by a grant of this application subject to the filing of an appropriate showing that ownership of Gannett stock complies with Section 310(a) of the Communication Act within 120 days from the date of this letter. This action is without prejudice to any action the Commission may take as a result of such further citizenship showing.

A petition to deny has been filed against the renewal application of Station WHEC–TV, Rochester, New York, licensed to WHEC, Inc., a wholly owned subsidiary of Gannett Co., Inc. The grant of the above transfer application is subject to such action as the Commission may deem appropriate following disposition of the petition to deny.

Additionally, the grant of this application is without prejudice to any action the Commission may take as a result of the final outcome of Commission Docket No. 18110.

Commissioner Hooks dissenting.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74-450

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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|---|---|
| In Re Applications of<br>TELEPROMPTER CABLE COMMUNICATIONS CORP.<br>(BLUE MOUNTAIN TELEVISION CABLE DIVISION) WALLA WALLA, WALLA WALLA COUNTY, COLLEGE PLACE, WASH.<br>For Certificates of Compliance and Special Relief | CAC-1744; WA034<br>CAC-1745; WA035<br>CAC-1721; WA036 |

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released May 1, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On December 12, 1972, Blue Mountain Television Cable, a division of Teleprompter Cable Communications Corporation, filed "Applications for Certificates of Compliance and a Request for Waiver of Section 76.5 and 76.59" of the Commission's Rules (CAC-1721, CAC-1744, CAC-1745), in which it proposes to add television signals to its three existing cable television systems at Walla Walla, College Place, and certain unincorporated areas of Walla Walla County, Washington. The area of Walla Walla County that TPT actually serves and the town of College Place are located outside all television markets. The City of Walla Walla, however, is located partially within the Kennewick-Pasco-Richland, Washington, smaller television market. These cable television systems now carry the following television signals:

KREM-TV (ABC, Channel 2), Spokane, Wash.
KXLY-TV (CBS, Channel 4), Spokane, Wash.
KHQ-TV (NBC, Channel 6), Spokane, Wash.
KNDU (NBC, Channel 25), Richland, Wash.
KEPR-TV (CBS/ABC, Channel 19), Pasco, Wash.
KSPS-TV (Educational, Channel 7), Spokane, Wash.
CHEK-TV (CBC, Channel 6), Victoria, B.C.
KCTS-TV (Educational, Channel 9), Seattle, Wash.
KTNT-TV (Independent, Channel 11), Tacoma, Wash.
KTVW [1] (Independent, Channel 13), Tacoma, Wash.
KVEW (ABC, Channel 42), Kennewick, Wash.

[1] Although KTVW is not currently carried on any of the above-captioned systems, TPT claims grandfathered status for this signal and plans to eventually re-institute carriage thereof. Applicant formally requests authorization to carry KTVW on the above-captioned systems in the event the Commission disagrees with TPT's claim that the signal is grandfathered. Walla Walla has a population of 22,986; Walla Walla County, 40,722; and College Place, 4,361. Applicant currently operates 12 channel cable television systems at each of the above locations.

Applicant seeks to add the following television broadcast signals:

KVOS–TV (CBS, Channel 12), Bellingham, Wash.
KPTV (Independent, Channel 12), Portland, Oreg.
KTVU (Independent, Channel 2), Oakland, Calif.

These applications are opposed by Columbia Empire Broadcasting Corporation, licensee of Television Broadcast Station KNDU, Richland, Washington; NWG Broadcasting Company, licensee of Station KEPR–TV, Pasco, Washington; Apple Valley Broadcasting, Inc., licensee of Television Broadcast Station KVEW, Kennewick, Washington. Concurrent with its opposition, NWG Broadcasting Company also filed a request for special relief, pursuant to Section 76.7 of the Commission's Rules.

2. TPT requests waiver of Sections 76.5 and 76.59 of the Rules, so that the City of Walla Walla can be classified as being outside all television markets. In support of its request, TPT argues that on October 13, 1971, the City of Walla Walla annexed a farm to the west of its former city limits. This annexation had the effect of placing the City's boundaries slightly inside the Pasco, Washington 35-mile zone. Applicant states that only a *de minimis* waiver is required in this case, because Pasco's 35-mile zone penetrates only this unpopulated area.[2] TPT cites *Diversified Communications Investors, Inc.*, 37 FCC 2d 981 (1972),[3] as an analogous situation where such a waiver was granted. Applicant also points out that it would be illogical for the College Place and Walla Walla County systems, both located outside all markets and carrying signals from the same headend that serves the City of Walla Walla, to enjoy the unlimited signal reception of non-market status, while Walla Walla is denied such reception solely because a tiny, unpopulated, and recently annexed portion of that City is barely cut by the 35-mile zone of the Pasco, Washington, market.

3. All three television stations argue that, since the Kennewick-Pasco-Richland smaller television market is served only by UHF stations, a grant of the applications will have a severe economic impact on this market. They further argue that the Commission's network program exclusivity rules do not give adequate protection against the pre-release of American network programming by Canadian Station CHEK–TV. NWG requests thirty (30) days program exclusivity protection vis-a-vis Station CHEK–TV, and Apple Valley asks the Commission to rule that such pre-release practices be discontinued. Columbia Empire Broadcasting also argues that applicant's reliance on *Diversified Communication Investor's, Inc.*, 37 FCC 2d 981 (1972), is misplaced, since that case is distinguishable. In support of its claim that the two cases are distinguishable, Columbia notes that in *Diversified*, waiver was sought to add one distant signal to aid a new cable television system in attaining minimum viability, whereas here applicant requests carriage of three distant signals for well-established

[2] The annexed area was acquired by the City to be used as the site for the City's sewage treatment plant.

[3] In *Diversified*, applicant sought waiver of Section 76.59, so that the location of the southeastern tip of Littlefield, Texas, just inside the 35-mile zone of Lubbock, Texas, and populated by only 31 people, would not deprive applicant of its status as a cable television system outside all markets. The Commission said that the relatively small population in the franchise area encompassed by the 35-mile zone warranted a waiver, absent a showing that cable television service beyond the 35-mile zone would pose a unique threat to the economic stability of market television stations.

systems, each of which already carries eleven signals. NWG Broadcasting Company challenges the applicant's statement that the Walla Walla County cable system is located outside all markets. NWG alleges that, although TPT has a franchise for all of Walla Walla County, it has arbitrarily established the boundaries of its service area within the county so that the area the system serves falls outside the Pasco, Washington, specified zone. Absent these "artificial" boundaries, the system would be subject to the smaller market television rules. Finally, NWG requests that the Commission require applicant to give notice and file certificate applications prior to reinstituting carriage of Station KTVW.

4. We must reject these oppositions. We find unpersuasive the stations' arguments that granting applicant's request for waiver would cause them severe economic damage. As we pointed out in *Diversified*, *supra*, where only a small, lightly populated portion of the community of a cable television system is located within a smaller market specified zone, a *de minimis* waiver of the Rules is appropriate so that the community may be treated as outside of all markets. This case involves a city which would otherwise be outside of all markets, but for the annexation of an unpopulated area for use as a sewage treatment plant. It clearly follows from *Diversified* that this is an appropriate place for a *de minimis* waiver. *See Harbor-Vue Cable TV, Inc.*, 42 FCC 2d 1067 (1973). NWG's claim that applicant's Walla Walla County system is located partially within the Pasco specified zone is incorrect. Its argument that TPT arbitrarily established its boundaries to gain the signal carriage benefits of out-of-market status overlooks the fact that H & B Communications Corporation, TPT's predecessor in interest, commenced service in 1953 to an area within Walla Walla County, whose boundaries were later specified in a Commission proceeding.[4] Since the area actually served within Walla Walla County is entirely outside the relevant specified zone, we find that the community of the county system is located outside all markets, thus entitling applicant to carry the signals it has requested.[5] On the facts presented by the stations, we do not find that Station CHEK–TV's pre-release of programs justifies granting the special relief that NWG requests. In the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 236 (1972), at para. 32, we rejected a proposal that the exclusivity rules be amended to prohibit a cable television system from carrying network programs broadcast by foreign stations at any time prior to their first domestic broadcast. We said, that, although the pre-release problem did not appear especially significant, special relief pursuant

[4] *H & B Communications Corporation*, 19 FCC 2d 943 (1969). In that case H & B Communications Corporation sought to add Station KTVW to its cable system pursuant to former Section 74.1105 of the Commission's Rules. An opposition was filed, and in the ensuing proceeding, the Commission notified H & B that unless the latter filed a written specification of the area of Walla Walla County actually served, the Commission would treat the H & B proposal as within the smaller market restrictions of proposed Section 74.1107(d). H & B responded by delineating the boundaries of the area actually served. Consequently, the Commission confirmed these boundaries by authorizing the addition of Station KTVW.

[5] *Mission Cable TV, Inc.*, 4 FCC 2d 236 (1966), cited by NWG is not relevant, since it dealt with a determination of whether service to separate and distinct areas in a county imparted grandfathered signal carriage rights to other such unincorporated areas of the county. Of course, if TelePrompTer should subsequently decide to serve parts of the county located within the subject smaller television market, it will have to obtain separate Commission certification therefor.

to Section 76.7 of the Commission's Rules provides a remedy for those who can make an appropriate showing of need. In this case, Station CHEK–TV weekly pre-releases only 5 CBS, 2 NBC, and 3 ABC programs. Even though CBS affiliate KEPR–TV is the complaining station most affected (CHEK–TV pre-releases five CBS programs per week), its licensee, NWG, makes no showing that CHEK–TV's pre-release of programming has so reduced KEPR–TV's audience and advertising revenues that its programming service is significantly impaired.[6]

5. Finally, in response to NWG's argument that certification for Station KTVW is required, TPT has requested certification in the event the Commission determines that it is necessary. We have indicated in *Alabama Cablevision Company*, 43 FCC 2d 980 (1973), that if the signal in question was not being carried as of March 31, 1972, a certificate of compliance is required to reinstitute carriage. Since we have determined herein that TPT's cable systems are operating outside of all markets, all three systems are entitled to certification to carry Station KTVW, pursuant to Section 76.57(b) of the Commission's Rules. For the same reason, we need make no determination in this case of TPT's claim to grandfathered status for Station KTVW under Section 76.65.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications and accompanying request for waiver would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition" filed by Columbia Empire Broadcasting Corporation, licensee of Television Broadcast Station KNDU, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition To Applications for Certificates of Compliance and Waiver and Request of KEPR–TV for Special Relief", filed by NWG Broadcasting Company, licensee of Station KEPR–TV, IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition To Applications For Certificates of Compliance And For Request For Waiver of Sections 76.5 and 76.59", filed by Apple Valley Broadcasting, Inc., licensee of Television Broadcast Station KVEW, IS DENIED.

IT IS FURTHER ORDERED, That the application for certificates of compliance and request for waiver of sections 76.5 and 76.59 (CAC–1744, WAO34; CAC–1745, WAO35; CAC–1721, WAO36), ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[6] *See, e.g., Colorcable, Inc.*, 25 FCC 2d 195 (1970); *Columbia Broadcasting System, Inc.*, 25 FCC 2d 212 (1970).

FCC 74-451

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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|---|---|
| In Re Order To Show Cause Directed Against | |
| TELEPROMPTER CABLE CO., WALLA WALLA, WASH. | CSC-71 |
| RICHLAND TV CABLE CO., RICHLAND, WASH. | CSC-71 |
| MICRO-CABLE COMMUNICATIONS CORP., KENNEWICK, WASH. | CSC-71 |
| MICRO-CABLE COMMUNICATIONS CORP., PASCO, WASH. | CSC-71 |

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released May 1, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On November 2, 1973, Apple Valley Broadcasting, Inc., licensee of Television Broadcast Station KVEW, Kennewick, Washington, filed "UHF Station KVEW's Urgent Petition for Cease and Desist Orders to Achieve Systems Compliance with FCC Cable Rules and Requirements and Request for Necessary Emergency Relief" directed against TelePrompTer Cable Communications Corporation, operator of cable television systems at Walla Walla and Richland, Washington, and against Micro-Cable Communications Corporation, operator of cable television systems at Kennewick and Pasco, Washington, for alleged violation of Sections 76.55, 76.91, and 76.93 of the Commission's Rules.[1] On November 12, 1973, TelePrompTer filed an "Opposi-

[1] Section 76.55 of the Rules provides in relevant part:
"(a) Where a television broadcast signal is required to be carried by a cable television system, pursuant to the rules in this subpart:
"(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art), and, where applicable, in accordance with the technical standards of Subpart K of this part;
"(2) The signal shall, on request of the station licensee or permittee, be carried on the system on the channel number on which the station is transmitting, except where technically infeasible;"
Section 76.91(a) of the Rules states:
"(a) Any cable television system operating in a community, in whole or in part within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in §§ 76.93 and 76.95.
"(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows:
"(1) First, all television broadcast stations within whose principal community contours the community of the system is located, in whole or in part;
"(2) Second, all television broadcast stations within whose Grade A contours the community of the system is located, in whole or in part;
"(3) Third, all television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part:"
Section 76.93 of the Rules provides in pertinent part:
"§ 76.93 Extent of protection.
"(a) Where the network programming of a television station is entitled to program exclusivity, the cable television system shall, on request of the station licensee or permittee, refrain from simultaneously duplicating any network program broadcast by such station . . . ."

tion of TelePrompTer Cable Communications Corporation," and on November 14, 1973, Micro-Cable filed an "Opposition to Petition for Cease and Desist Orders and Request for Emergency Relief." On December 3, 1973, Apple Valley filed a "Response by UHF Television Station KVEW to Oppositions by TelePrompTer and Micro-Cable Communications to 'Petition for Cease and Desist Orders and Request for Emergency Relief.' "

2. TelePrompTer and Micro-Cable operate twelve channel cable television systems at the above-captioned communities. Micro-Cable's cable television systems carry the following signals:

KVOS–TV (CBS), Bellingham, Wash.
KVEW (ABC), Kennewick, Wash.
KEPR–TV (CBS), Pasco, Wash.
KWSU–TV (Educational), Pullman, Wash.
KNDU (NBC), Richland, Wash.
KCTS–TV (Educational), Seattle, Wash.
KHQ–TV (NBC), Spokane, Wash.
KREM–TV (ABC), Spokane, Wash.
KXLY–TV (CBS), Spokane, Wash.
KTNT–TV (Independent), Tacoma, Wash.
CHEK–TV (CBS), Victoria, B.C.

TelePrompTer carries basically the same signals on its cable television systems, except that it carries KSPS–TV, Spokane, Washington and does not carry KVOS–TV or KWSU–TV. KVEW places a predicted Grade A contour over Kennewick, Pasco, Richland and Walla Walla, while KREM–TV's predicted Grade B contour falls short of these communities.

3. Apple Valley claims that after proper notification, TelePrompTer and Micro-Cable failed to accord KVEW exclusivity against network programming broadcast by KREM–TV on October 3, 6, and 7, 1973. Apple Valley also contends that Respondents violated Sections 76.91(a) and 76.93(a) by carrying both KVEW's 6:00 P.M. broadcast of the ABC *Monday Night Football Game* and KREM–TV's 7:00 P.M. delayed broadcast of the same program. Petitioner argues that Sections 76.91 and 76.93 required exclusivity even though KREM–TV broadcast the football games one hour later than KVEW, because network exclusivity protection should apply for the entire duration of the program. Apple Valley also asserts that TelePrompTer and Micro-Cable materially degrade KVEW's signal and that KVEW is entitled to carriage on the low-band portion of TelePrompTer's Cable Television systems rather than on channel 12. Apple Valley acknowledges that the Commission previously rejected its claim to such carriage in *TelePrompTer Cable Communications Corporation*, FCC 73–791, —— FCC 2d ——. But Apple Valley argues that the alleged exclusivity violations and material degradation result from conspiracy between the above-captioned cable television systems to harm KVEW and that the Commission therefore should reverse its previous decision.

4. We find that Respondents' carriage of KREM–TV's delayed broadcast did not violate the network exclusivity rules, because KREM–TV did not simultaneously duplicate KVEW's broadcast. Apple Valley is incorrect in its contention that exclusivity should apply for the duration of the program. Section 76.93(b) provides

same-day exclusivity only for stations in the Mountain Time Zone under Section 76.93(a); all other stations are entitled only to simultaneous exclusivity. As we stated in Par. 33 of *Reconsideration*, 36 FCC 2d 326, —— "to qualify for simultaneous exclusivity protection, no more than 5 or 10 minutes of a program may be overlooked."

5. TelePrompTer admits that its Richland cable television system failed to protect the *ABC News* and *Wide World of Entertainment* on October 7, 1973, but claims that it protected KVEW's network programming at all other times. These failures allegedly were caused by a new employee's error in programming an automatic switching device. Apple Valley asserts, however, that TelePrompTer's Richland and Walla Walla cable television systems totally failed to provide KVEW with proper network exclusivity protection on October 3, 6, and 7, 1973.

6. Micro-Cable concedes that it did not give KVEW exclusivity protection on October 3, 6, and 7, 1973. Micro-Cable states that its failure to do so was caused by the fact that its switcher broke down on September 21, 1973, and was not reinstalled until October 8, 1973. Micro-Cable further argues that it was not required to supply exclusivity protection when KVEW's signal was poor in quality. We reject Micro-Cable's arguments. Switcher breakdowns do not *per se* justify 17 days of failure to accord exclusivity protection. Micro-Cable has not shown why it could not have provided proper exclusivity protection by manual switching. And Micro-Cable's proper avenue for raising KVEW's allegedly poor signal was by way of petition for waiver, not unilateral action. Although *Community Service, Inc.*, 21 FCC 2d 719 (1970) and *Black Hills Video Corp.*, 2 FCC 2d 465 (1966) held that exclusivity was not required when a television station's signal was technically deficient, they do not give Micro-Cable a unilateral right to determine that KVEW's signal was deficient.

7. Apple Valley has not documented its complaint that the cable television systems materially degrade its signal. It bases its claim only on its own visual observations and some unspecified subscriber complaints. These unsubstantiated allegations do not warrant Commission action.

8. In *TelePrompTer Cable Communications Corporation, supra*, we held that a cable system was not required to carry a UHF station on any particular channel. We are not persuaded by Apple Valley's undocumented claims of a conspiracy among the TelePrompTer cable television systems that we should impose an obligation on these systems which we previously rejected and which is not required by the rules.

9. TelePrompTer and Micro-Cable thus admittedly violated Sections 76.91(a) and 76.93(a) at various times. We do not believe that these violations, however, warrant issuance of Orders to Show Cause. The violations at issue here are of a comparatively minor nature, and do not represent a continuing course of conduct. Apple Valley has failed to submit any documentation to indicate that TelePrompTer and Micro-Cable are engaged in a consistent pattern of violations. Accordingly, we exercise our discretion not to grant the requested Orders to Show Cause. *C. J. Community Service* v. *FCC*, 246 F. 2d 660 (D.C. Cir. 1957).

In light of the foregoing, we find that issuance of the requested Orders to Show Cause would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That "UHF Station KVEW's Urgent Petition for Cease and Desist Orders to Achieve Systems Compliance with FCC Cable Rules and Requirements and Request for Necessary Emergency Relief" filed by Apple Valley Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-424

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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| In Re Cease and Desist Order Directed Against VIDEO ENTERPRISES, INC., HOLYOKE AND SOUTH HADLEY, MASS. | Docket No. 20038 SR 127105 |

ORDER TO SHOW CAUSE

(Adopted April 17, 1974; Released May 1, 1974)

BY THE COMMISSION:

1. Video Enterprises, Inc., operates cable television systems serving Holyoke and South Hadley, Massachusetts. Each system is located within the Springfield, Massachusetts, smaller television market and carries the following television broadcast signals:

WFSB–TV, 3, CBS, Hartford, Conn.
WBZ–TV, 4, NBC, Boston, Mass.
WCVB–TV, 5, ABC, Boston, Mass.
WTNH–TV, 8, ABC, New Haven, Conn.
WTEN, 10, CBS, Albany, N.Y.
WHCT–TV, 18, Independent, Hartford, Conn.
WWLP, 22, NBC, Springfield, Mass.
WEDH, 24, Educational, Hartford, Conn.
WSMW–TV, 27, Independent, Worcester, Mass.
WHNB–TV, 30, NBC, New Britain, Conn.
WHYN–TV, 40, ABC, Springfield, Mass.
WGBY–TV, 57, Educational, Springfield, Mass.
WSBK–TV, 38, Independent, Boston, Mass.

On December 9, 1971, the WHYN Stations, Corp., licensee of Station WHYN–TV, filed a "Petition for Show Cause Order," in which it sought a Commission order directing Video to show cause why it should not cease and desist from the carriage of Station WSBK–TV on its systems at Holyoke and South Hadley. Video opposed the petition.

2. WHYN asserts that carriage of Station WSBK–TV(a) commenced without proper notice pursuant to former Section 74.1105 of the Commission's Rules, and (b) constitutes the importation of a distant signal in violation of former Section 74.1107 of the rules since WSBK–TV does not place a predicted Grade B contour over either Holyoke or South Hadley.[1] Nevertheless, WHYN would not object

[1] These former rules provided in pertinent part as follows:
"§ 74.1105 Notification prior to the commencement of new service.
"(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose

to carriage of WSBK–TV if it were limited solely to the Boston Bruins' hockey games. Video contends that the predicted Grade B of WSBK–TV does encompass a portion of South Hadley, and has submitted a qualified engineer's verified statement to that effect. Carriage at Holyoke on the other hand, is justified only by that community's alleged close relationship with South Hadley. Video concludes its opposition by stating that it will agree to limit carriage of WSBK–TV to the Boston Bruins' games if WHYN will withdraw its "Petition For Show Cause Order." The petition has not been withdrawn and there is no evidence of an agreement to limit the carriage.

3. No notice was ever given by Video that it intended to commence carriage of WSBK–TV on its cable systems at Holyoke and South Haldey and no petition was ever submitted to obtain the Commission's authorization. Therefore, the signal of this station has never been authorized for carriage at either community and cannot be "grandfathered" pursuant to Section 76.65 of the Commission's present Rules.[2] We note that no application for a Certificate of Compliance has been filed and the carriage of WSBK–TV is questionable in any event: WSBK–TV is not a "must carry" signal under Section 76.59(a) of the rules, and cannot be carried as an "additional" signal pursuant to Section 76.59(b)(2) unless the cable systems delete the other independent stations presently being carried. Thus, carriage of WSBK–TV at Holyoke and South Hadley is not consistent with the carriage provisions of the Commission's Rules. Deviations from these rules can only be made pursuant to waivers granted by the Commission, not by private agreements which may have been made between the parties. The proper forum for obtaining a waiver of the rules is before the Commission where all the interests involved will be considered. Therefore, even if Video and WHYN have entered into an agreement limiting the carriage of WSBK–TV, the Commission will not be prevented from making its own determinations and taking any action it deems appropriate. All cable television systems operating in smaller television markets are required to carry signals in accordance with the provisions of Section 76.59 of the Commission's Rules. In view of Video's continued carriage of Station WSBK–TV in violation of Section 76.59 and our former rules, we shall issue the Order to Show Cause.

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predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given."

Sec. 74.1107(c), while not apposite stated that:

"No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area."

[2] § 76.65 Grandfathering provisions.

The provisions of §§ 76.57, 76.59, 76.61 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972: Provided, however, That if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart. If a cable television system in a community is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other cable television system already operating or subsequently commencing operations in the same community may carry the same signals. (Any such new system shall, before instituting service, obtain a certificate of compliance, pursuant to § 76.11).

Accordingly, IT IS ORDERED, That pursuant to Sections 312 (b) and (c), and 409(a), of the Communications Act of 1934, as amended, U.S.C. 312 (b) and (c), and 409(a), Video Enterprises, Inc., IS DIRECTED TO SHOW CAUSE why it should not be ordered to cease and desist from further violation of Section 76.59 of the Commission's Rules on its cable television systems at Holyoke and South Hadley, Massachusetts.

IT IS FURTHER ORDERED, That Video Enterprises, Inc., IS DIRECTED to appear and give evidence at a hearing to be held at Washington, D.C. at a time and place before an Administrative Law Judge to be specified by subsequent Order, unless the hearing is waived in which event a written statement may be substituted.

IT IS FURTHER ORDERED, That the WHYN Stations Corp. and Chief, Cable Television Bureau ARE MADE parties to this proceeding.

IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this Order by Certified Mail to Video Enterprises, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-429

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In Re Application of WARNER CABLE OF PITTSFIELD/DALTON, A DIVISION OF WARNER TVC CORP., DALTON, MASS. For Certificate of Compliance and Petition for Special Relief | CAC-481, MA027 CSR-219 |

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released May 1, 1974)

BY THE COMMISSION:

1. Warner Cable of Pittsfield/Dalton, a division of Warner TVC Corporation,[1] operates a cable television system at Dalton, Massachusetts, a community located within the Albany-Schenectady-Troy, New York, major television market (#34).[2] The system now provides its subscribers with the following television broadcast signals:

WBZ-TV (NBC, Channel 4), Boston, Mass.
WCVB-TV (ABC, Channel 5), Boston, Mass.
WTIC-TV (ABC, Channel 3), Hartford, Conn.
WEDH (Educational, Channel 24), Hartford, Conn.
WTNH-TV (ABC, Channel 8), New Haven, Conn.
WWLP (NBC, Channel 22), Springfield, Mass.
WGBY-TV (Educational, Channel 57), Springfield, Mass.
WTEN (CBS, Channel 10), Albany, N.Y.
WAST (ABC, Channel 13), Albany, N.Y.
WRGB (NBC, Channel 6), Schenectady, N.Y.

In its application, Warner Cable requests certification to carry the following additional television signals:

WOR-TV (Independent, Channel 9), New York, N.Y.
WPIX (Independent, Channel 11), New York, N.Y.
WSMW-TV (Independent, Channel 27), Worcester, Mass.

Carriage of WSMW-TV is consistent with Section 76.61(b)(2) of the Commission's Rules.

2. Carriage of Stations WOR-TV and WPIX, both New York, New York, is opposed by Sonderling Broadcasting Corporation, li-

[1] The original application was filed by Pittsfield-Dalton TV Cable, a division of Television Communications Corporation, Warner Cable's predecessor in interest.

[2] Dalton has a population of 7,664, and Warner Cable was serving 1,457 subscribers as of December 31, 1972. The cable system commenced operations in October, 1964. Warner Cable's 1972 Form 325 indicates that its Dalton cable television system presently has a 12-channel capacity. In its application, Warner Cable assures the Commission that it will comply with the pertinent provisions of Section 76.251 of the Rules, which deal with the provision of access services.

censee of Television Broadcast Station WAST, Albany, New York; Albany Television, Inc., licensee of Television Broadcast Station WTEN, Albany, New York; and Springfield Television Broadcasting Corporation, licensee of Television Broadcast Station WWLP, Springfield, Massachusetts. The opposing parties point out that the New York, New York-Linden-Paterson, New Jersey, major television market is the third closest top 25 television market from Dalton, Massachusetts, and carriage of independent Stations WOR–TV and WPIX is inconsistent with the leapfrogging provisions of Section 76.61(b)(2) of the Commission's Rules.[3] Warner Cable has acknowledged that carriage of WOR–TV and WPIX is inconsistent with the Rules and has petitioned for special relief authorizing carriage of the two New York City stations. Faith Center, licensee of Station WHCT–TV, Hartford, Connecticut, in a comment on Warner Cable's application, requests that WHCT–TV be carried in addition to the New York stations for which carriage is sought.

3. Warner Cable supports its request for carriage of Stations WOR–TV and WPIX with the following statements: (a) Station WHCT–TV should not be counted as an independent for purposes of Section 76.61(b) of the Rules because Faith Center operates with a limited programming format, devoting a substantial part of its broadcast week to religious and locally oriented programming; (b) The New York independents requested are carried on cable systems serving communities near Dalton, Massachusetts; (c) Dalton has a subscriber potential of only 1,675, and the possible impact of allowing the New York independents to be carried on the Dalton cable system would be negligible.

4. The arguments presented by Warner Cable have not persuaded us to depart from our "go, no-go" policy set forth in paragraph 112 of *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 186 (1972). In *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 334 (1972), we specifically refused to exempt religious and other specially programmed stations from the distant signal quota sections of the Rules. Furthermore, Warner Cable's arguments do not amount to a showing of special circumstances that would warrant a waiver of the Commission's carriage rules.[4] *Moshannon Valley TV Cable Co., Inc.*, FCC 73–1206, 43 FCC 2d 1190 (1973). Therefore, Warner Cable's request for special relief to carry Stations WOR–TV and WPIX, New York, New York, must be denied.

5. The arguments presented in Faith Center's request for carriage have previously been considered and rejected by the Commission in its reconsideration of *Commission on Cable Television of the State*

[3] Section 76.61(b)(2) states, in pertinent part, "[t]hat if [distant independent] signals of stations in the first 25 major television markets are carried pursuant to this subparagraph, such signals shall be taken from one or both of the two closest such markets, where such signals are available."

[4] In *Commission on Cable Television of the State of New York*, FCC 73–1148, 43 FCC 2d 826 (1973), *recons. denied*, FCC 74–99, 45 FCC 2d 283 (released February 8, 1974), the Commission granted special relief to allow carriage of New York City independent stations on New York cable systems located within the Albany-Schenectady-Troy television market. The Commission's decision in that case was predicated upon the community of interest which exists between New York State television viewers and New York City. The community of interest rationale is inapposite to the instant proceeding which concerns a cable system serving Massachusetts viewers.

*of New York*, FCC 73–1148, 43 FCC 2d 826 (1973), *recons. denied*, FCC 74–99, —— FCC 2d —— (released February 8, 1974). The Commission's determination in the above-cited case applies equally here, and Faith Center's request will be denied.

6. Springfield Television Broadcasting Corporation, licensee of Television Broadcast Station WWLP, Springfield, Massachusetts, has filed a petition for special relief in which it requests that Station WWLP (NBC, Channel 22), presently carried on Warner Cable's Dalton system, be afforded network program exclusivity with respect to Station WRGB (NBC, Channel 6), Schenectady, New York. This petition for special relief is opposed by Warner Cable.

7. Springfield Television supports its petition for special relief with the following statements: (a) Dalton is located only slightly further from the designated reference point for Springfield, Massachusetts, than from the designated reference point for the Albany television market; (b) there is a basic community of interest between Dalton and Springfield, which is greater than any community of interest which Dalton may have with the Albany television market; (c) Station WWLP has structured its programming to cater to the needs and interests of the people of the western Massachusetts region, which includes Dalton; (d) Station WWLP, a Massachusetts station, is in a better position to provide the residents of Dalton with programs directly related to their needs and interests than is WRGB, a New York station; (e) extension of nonduplication protection to WWLP would afford WWLP with a meaningful addition to its overall audience circulation and would thereby be in conformity with the Commission's stated policy of aiding in the development and expansion of UHF television service; and (f) a grant of Springfield Television's petition for special relief would not result in any loss of program service to Warner Cable's subscribers.

8. We rule on Springfield Television's arguments as follows: (a), (b), (c), and (d)—these statements are irrelevant because, in any case, the non-network programming of WWLP will be carried on the Dalton cable television system; (e) the fact that a television station is UHF is immaterial in the context of exclusivity. *Danville Cablevision Co.*, FCC 73–1176, 44 FCC 2d 354 (1973); and (f) loss of program service is not an issue in the context of exclusivity. In *Pittsfield Dalton TV Cable*, FCC 72–59, 33 FCC 2d 383 (1972), the Commission ordered the operator of the Dalton cable television system to provide exclusivity protection to WRGB vis-a-vis the signal of WWLP. In that proceeding, the Commission determined that WRGB placed a predicted Grade A contour over Dalton, Massachusetts, and that WWLP placed a predicted Grade B contour over Dalton. In this this proceeding, Springfield has failed to present evidence which warrants a reversal of our previous decision.[5]

In view of the foregoing, the Commission finds that a partial grant of the subject application, a grant of the subject oppositions, and a

[5] *Pittsfield-Dalton TV Cable, supra*, was decided pursuant to Section 74.1103 of our old Rules. That section is substantially the same as Section 76.91 of our present Rules, which provides that a cable television system operating in a community within the Grade A contour of a television broadcast station, on request of that station, shall maintain the station's exclusivity as an outlet for network programming against duplicating signals of lower priority.

denial of the petitions for special relief is consistent with the public interest.

Accordingly, IT IS ORDERED, That the oppositions to the subject application filed by Sonderling Broadcasting Corporation, Albany Television, Inc., and Springfield Television Broadcasting Company, ARE GRANTED.

IT IS FURTHER ORDERED, That the request for carriage filed by Faith Center, licensee of Station WHCT–TV, Hartford, Connecticut, IS DENIED.

IT IS FURTHER ORDERED, That the petition for special relief for waiver of Section 76.91 of the Commission's Rules, filed by Springfield Television Broadcasting Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the petition for special relief for waiver of Section 76.61(b)(2) of the Commission's Rules, (CSR–219), filed by Warner Cable of Pittsfield/Dalton, IS DENIED.

IT IS FURTHER ORDERED, That the "Application for Certification" (CAC–481), filed by Warner Cable of Pittsfield/Dalton, a division of Warner TVC Corporation, IS GRANTED to the extent indicated above, and in all other respects IS DENIED, and the appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-160

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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| In Re Applications of<br>WESTERN COMMUNICATIONS, INC. (KORK-TV), LAS VEGAS, NEV.<br>For Renewal of License | Docket No. 19519<br>File No. BRCT-327 |
| LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV.<br>For Construction Permit for New Television Broadcast Station | Docket No. 19581<br>File No. BPCT-4465 |

MEMORANDUM OPINION AND ORDER

(Adopted April 30, 1974; Released May 1, 1974)

BY THE REVIEW BOARD:

1. Western Communications, Inc. (Western), in another of a long series of petitions to enlarge issues against Las Vegas Valley Broadcasting Co. (Valley), its competitor in this proceeding, seeks addition of an issue as to the cost of Valley's transmitting tower and the effect thereof on that applicant's financial qualifications and a related misrepresentation, lack of candor, Section 1.65 and/or Section 1.514 issue.[1]

2. To understand what this petition entails and the basis of our disposition of it, some factual background is needed. When Valley filed its application on September 1, 1971, a guyed antenna tower 80 feet high was specified and a sum of $92,000 was provided to cover the cost of the tower, antenna, transmission line and other elements of the antenna system. Part of Valley's financial showing consisted of a credit letter from RCA covering equipment in the amount of "approximately $1,470,000." The letter is dated August 25, 1971. No detailed breakdown of the equipment proposal and cost of the respective items was included in the letter, but Section V-C of the application form did give the type numbers and makes of much of the transmitting equipment. A mountain top site where two other television transmitters were already located was specified. On October 26, 1971, some ten months before this case was designated for comparative hearing, Valley amended its application in several respects, one of which was in its engineering proposal to change to a 225 foot guyed tower and a new site. The equipment credit letter was not changed by this amendment or by any of the several subsequently filed amendments to Valley's application.

[1] The petition was filed February 8, 1974; an addendum was filed February 13, 1974; and Valley and the Broadcast Bureau filed oppositions on February 21, 1974. Western filed a reply on March 5, 1974, after which Valley submitted, on March 18, 1974, a response.

3. After the comparative proceeding was initiated, Western filed on October 6, 1972, a motion to enlarge issues in which, among other things, the amount of equipment Valley would buy from RCA was questioned, it being Western's view that Valley planned to purchase less than $1,470,000 worth of material from RCA with the result that less than $1,042,287 in deferred credit would be available. In its petition, Western made a rather detailed analysis of Valley's technical proposal and the costs of various items included therein. Western also challenged Valley's transmitter site costs, including the cost of 125 feet of transmission line in addition to the 150 feet of this item originally proposed. Farther on in its petition, Western contended that at the amended site on Black Mountain, the erection of a 225 foot guyed tower was not feasible and that a self-supporting tower would be required. In one of the affidavits attached to the petition, an engineering consultant specifically referred to the need for Valley to purchase additional transmission line, to the 80 feet guyed tower Valley first proposed, and to the 225 foot guyed tower called for at the new site.

4. When Valley responded to that petition, it contended that there was sufficient leeway in the RCA letter to permit the erection of a guyed or a self-supporting tower without any change in the financial arrangements. Valley relied heavily on an affidavit from a Communications Consultant, Mr. Packard, who referred to conversations with Mr. Luddy, a representative of RCA, concerning the equipment to be acquired, and with Mr. Bergen, a consulting engineer, also about the equipment proposal. Specifically, Mr. Packard discussed the aforementioned letter of credit which, he stated, was the result of conversations between Luddy, Bergen and himself. He referred to later discussions which led to tentative proposed changes in the equipment arrangements to effectuate a reduction in overall costs but stated that these did not lead to the issuance of a new RCA letter of credit or an amendment to the application. Packard then went on to make the following representations:

> "On November 7 and 8, 1972, I held telephone conversations with Noel Luddy and Serge Bergen to determine whether the revisions previously considered, if effected, would be sufficient to allow for the increased cost of a self-supporting tower, approximately 225 feet high, on Las Vegas Valley's proposed transmission site. The original proposal had provided approximately $30,000 for a guyed tower. Serge Bergen estimated, after discussions with Stainless, Inc., a tower manufacturer, that a 225 foot guyed tower would be completely installed for approximately $25,000. A self-supporting tower of the same height would cost, as estimated by Stainless, Inc., approximately $59,000. However, Stainless reports that a guyed tower could be used if a minimum of about 100 feet out from the base of the tower is available for guying. Mr. Bergen has personally seen the proposed site and is of the opinion that sufficient space exists for a guyed tower. Accordingly, he sees no reason for Valley to change its proposal to a self-supporting tower at this point.
>
> "However, in view of the above, it is my opinion that sufficient credit has been included within the present RCA letter to allow Las Vegas Valley to erect a guyed or a self-supporting tower on its proposed transmission site."

5. When it replied to the opposition, Western repeated its contention that if Valley did not purchase the full amount of equipment from RCA, the full amount of credit would not be available from RCA and maintained that Valley's opposition had failed to answer the

questions it raised regarding the transmitter site. Western did not challenge the correctness of Packard's estimates of the costs of constructing either a guyed or a self-supporting tower at the Black Mountain site. On March 9, 1973, the Board released a Memorandum Opinion and Order,[2] in which, among other things, it rejected the request for the letter of credit issue and the issue relating to transmitter site access and suitability. Referring to the possibility that Valley might have to erect a self-supporting rather than a guyed tower, the Board noted Packard's statement that there was sufficient leeway in the RCA proposal to permit this change and concluded that the circumstances did not warrant addition of the issue.

6. Turning now to the instant petition to enlarge, first the arguments concerning timeliness must be weighed. There can be no debate about the fact that Western was extremely late in filing this request, but Western argues that there is good cause for the delay because it did not have "reasonable cause for suspecting problems with the tower cost estimate figures" until January 25, 1974, during preparation for rebuttal hearings on Valley's proposal to meet its transmitter site access cost issue by means of helicopter transport. Western argues that until that time, it had no grounds for suspecting that the RCA deferred credit equipment proposal was based on a 100 foot rather than a 225 foot tower.

7. Western's arguments for good cause are, to put it very simply, incredible. From the time Valley filed its application to the filing of the instant petition, no change has been made in the equipment supplier's credit proposal, despite numerous other changes, including those involving the antenna tower; and since Valley changed the height of its proposed tower without changing the arrangements set forth in the supplier's credit proposal, Western had easily available to it all the data necessary to raise the question it now raises.

8. On its merits, Western's petition is equally deficient. The petition is in good measure based on an affidavit of Mr. Nelson, the sales manager of a tower manufacturer, who asserts that the construction of a guyed tower 225 feet high would cost $20,000 more than a guyed tower 100 feet high. He does not state what the cost would be. After Valley and the Bureau had filed their oppositions, Western submitted a reply containing another affidavit from Nelson stating that assuming normal site condition a guyed 225 foot tower would cost about $44,000, but that a tower of this height on Black Mountain [3] "would cost substantially more than $44,000.00 due to actual sight (sic) conditions." Again, no figure is given. In the Packard affidavit referred to earlier, an estimate of $59,000 for a 225 foot self-supporting tower is given and the opinion is expressed that sufficient credit is available to permit the construction of such a tower. Thus, even if the Board accepts Western estimate of substantially more than $44,000 being required, Valley has substantially more than that amount available.

9. The allegations in support of the misrepresentation and related issues are also lacking in merit. The misrepresentation which Western

[2] 39 FCC 2d 1077, 26 RR 2d 1456, review denied, FCC 74–175, released February 21, 1974.

[3] Nelson states that his company constructed and installed the self-supporting tower used by KLAS–TV on Black Mountain.

alleged in its petition to enlarge stems entirely from its own neglect in examining Valley's application as originally filed. However, in its reply pleading, petitioner attempts to bolster its misrepresentation contentions by submitting new material which should have been offered with the petition to enlarge. Thus, the engineering affidavit referred to above as well as the new affidavit from Mr. Luddy of RCA could justifiably be ignored because they were held until the reply was submitted. See *Industrial Business Corporation*, 40 FCC 2d 69, 26 RR 2d 1447 (1973). However, under the circumstances of this case, the Board will not follow that course but will examine the new material and also accept Valley's response to the reply.

10. The new Luddy affidavit contains assertions that on January 7, 1972, RCA issued an alternate letter of credit to Valley calling for total equipment purchases of approximately $1,390,000.00, a sum less than that specified in the letter filed with the application. However, Luddy concedes that the original letter was not modified or withdrawn. This concession, plus the fact that Valley denies having received the letter and never modified its application in this respect, leaves this aspect of Western's reply completely unpersuasive.

11. Western also attempts to undermine the Packard affidavit by pointing out that although the affidavit contains a statement that Mr. Bergen has seen the antenna site, at the hearing Bergen stated to the contrary. While the error is not to be condoned, it is not of sufficient impact, either standing alone or in conjunction with the other elements of Western's attack or Packard's affidavit, to warrant specification of additional issues either on the question of financial qualifications or of the misrepresentation and related matters urged by Western.

12. To summarize, no good cause for the late filing of this petition was shown. As to the merits, under the *Edgefield-Saluda* test,[4] the likelihood of prevailing on the issues it proposes is so slight that the public interest benefits inherent in the orderly and fair administration of the Commission's business are not outweighed and the petition must be denied.

13. Accordingly, IT IS ORDERED, That the petition to enlarge issues filed by Western Communications, Inc. (KORK–TV), on February 8, 1974, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[4] *The Edgefield-Saluda Radio Company, et al.*, 5 FCC 2d 148 (1966).

FCC 74R-159

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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|---|---|
| In Re Application of WLCY-TV, INC. (WLCY-TV), LARGO, FLA. For Construction Permit | Docket No. 19627 File No. BPCT-4484 |

MEMORANDUM OPINION AND ORDER

(Adopted April 29, 1974; Released May 2, 1974)

BY THE REVIEW BOARD:

1. This proceeding involves the application of WLCY-TV, Inc. (WLCY), licensee of VHF television station WLCY-TV, Largo, Florida, for a construction permit to modify its existing facilities.[1] Now before the Review Board is an appeal, filed on February 19, 1974, by Channel Nine of Orlando (Channel Nine), contesting the Administrative Law Judge's Memorandum Opinion and Order, FCC 74M-151, released February 11, 1974, denying Channel Nine's petition to intervene in this proceeding.[2]

2. Since April 1, 1969, VHF television Station WFTV, Channel 9, Orlando, Florida, has been operated on an interim basis by a joint venture composed of five applicants.[3] By decision of the Review Board (*Mid-Florida Television Corp.*, 33 FCC 2d 1, 23 RR 2d 521 (1972), review denied, 37 FCC 2d 559, 25 RR 2d 533 (1972)), the application of Mid-Florida Television Corporation (Mid-Florida) for a construction permit for Channel 9 was granted. Subsequently, Mid-Florida petitioned and was granted intervention in this proceeding in the interest of making a complete record on the UHF impact issue. See Memorandum Opinion and Order, FCC 73M-317, released March 8, 1973. As noted in the appeal now before the Board, Channel Nine did not seek intervention at that time, alleging that there was no occasion for it to do so in light of Mid-Florida's intervention. However, on November 6, 1973, the Commission's grant to Mid-Florida was set aside by the Court of Appeals, *TV 9, Inc.* v. *FCC*, —— F. 2d ——, 28 RR 2d 1115 (D.C. Cir. 1973), and the proceeding was remanded to the Commission.[4] Thus, since Mid-Florida lost its status as permittee of WFTV, Channel Nine, on January 8, 1974, filed a petition request-

[1] This proposed modification was designated for hearing by the Commission, by Memorandum Opinion and Order, 38 FCC 2d 86 (1972), on three issues, including a UHF impact issue.

[2] The Board also has before it for consideration the following related pleadings: (a) opposition, filed February 26, 1974, by WLCY; (b) opposition, filed February 27, 1974, by the Broadcast Bureau; and (c) reply to oppositions, filed March 11, 1974, by Channel Nine.

[3] Channel Nine, the name given the joint venture, consists of Mid-Florida Television Corporation; Central Nine Corporation; Florida Heartland Television, Inc.; Comint Corporation; and TV 9, Inc.

[4] A petition for rehearing, filed by the Commission, was denied by the Court on February 28, 1974, —— F. 2d ——, 29 RR 2d 963 (D.C. Cir. 1974). However, the Commission has announced that it intends to file a petition for a writ of certiorari with the United States Supreme Court.

ing that it be substituted as intervenor, noting that it would in all respects "stand in the shoes" of Mid-Florida. The Presiding Judge denied the petition on the ground that it was untimely, and that no showing of good cause had been made in support of the late filed pleading. (See Section 1.223(d) of the Commission's Rules.) The Judge found that notwithstanding the possibility of reversal on appeal, Channel Nine had voluntarily elected not to file for intervention and that although this election may have been unsound, it cannot now provide the good cause required by the rule for late intervention. The Judge also noted that Channel Nine was not a legal successor-in-interest to Mid-Florida.

3. Appellant bases its request to intervene on the effect of the Court's decision in *TV 9, Inc.* on Mid-Florida's status as permittee. It urges that since its interest is precisely the same as that of Mid-Florida, it "is now the only entity that can represent the interests formerly represented by Mid-Florida." Denial of its request, argues appellant, would be inconsistent with the Judge's prior action granting Mid-Florida's petition to intervene. Substantively, Channel Nine relies on *WFTL Broadcasting Co.*, v. *FCC*, 126 U.S. App. D.C. 227, 376 F. 2d 782, 9 RR 2d 2032 (1967); *Better T.V., Inc. of Dutchess County*, 26 FCC 2d 559, 20 RR 2d 794 (1970); and *Burlington Broadcasting Co.*, FCC 64–805, 3 RR 2d 260 (1964). Appellant urges that since it sought to intervene in response to a situation that had changed significantly since the proceeding was originally designated for hearing, its intervention should be allowed as a matter of sound discretion. In addition, Channel Nine claims that the Judge misconceived the motive and purpose behind its petition to intervene. Channel Nine disclaims any discontent with Mid-Florida's actions as intervenor and only seeks to succeed Mid-Florida and be bound by the existing record. Moreover, appellant argues that the Judge erred when he dismissed Channel Nine's interest in protecting their VHF channel with the observation that there is no issue in this proceeding regarding impact on that channel.

4. The Review Board will deny Channel Nine's appeal. We are in substantial agreement with the arguments presented in opposition by both WLCY and the Broadcast Bureau. Section 1.223(d) of the Commission's Rules required Channel Nine to show good cause for the late filing of its petition to intervene and to state how it would assist the Commission in the determination of the issues in question. In the Board's view, Channel Nine failed in both respects. The issues in this proceeding were published in the Federal Register on November 25, 1972 (37 FR 25067) and it was not until more than one year later that Channel Nine first sought leave to intervene. The only good cause alleged for the long delay is that Mid-Florida, as permittee, had filed for intervention, and that until the decision in *TV 9, Inc.* v. *FCC*, *supra*, Channel Nine had no need to intervene. In the Board's view, however, the Court's decision neither changed Mid-Florida's position as an intervenor in this proceeding nor gave rise to any circumstances which changed appellant's interest from that available at the time this proceeding was designated for hearing.[5] In addition, Channel

[5] The cases cited by Mid-Florida on this point are inapplicable. Those cases all present highly unusual factual situations not present here.

Nine failed to make the necessary showing of how its participation would assist the Commission in a determination of the issues in this proceeding. See *Middle Georgia Broadcasting Co.*, 32 FCC 2d 974, 23 RR 2d 510 (1972); *Joe L. Smith, Jr., Inc.*, FCC 65–394, 5 RR 2d 422 (1965). Indeed, appellant disclaims any discontent with Mid-Florida and stated that it would be bound by the record as it now stands. Under all the foregoing circumstances, the Board cannot find that the Administrative Law Judge abused his discretion in denying the requested intervention.[6] *Middle Georgia Broadcasting Co, supra.*

5. Accordingly, IT IS ORDERED, That the appeal from denial of intervention, filed February 19, 1974, by Channel Nine of Orlando IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[6] In light of the above, we need not consider whether the Presiding Judge misconstrued the scope of the UHF impact issue.